North Dakota Law Review

Volume 76 | Number 3 Article 3

2000

Reclaming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution

William C. Bradford

RECLAIMING INDIGENOUS LEGAL AUTONOMY ON THE PATH TO PEACEFUL COEXISTENCE: THE THEORY, PRACTICE, AND LIMITATIONS OF TRIBAL PEACEMAKING IN INDIAN DISPUTE RESOLUTION

WILLIAM C. BRADFORD*

> "Nothing is gained by dwelling upon the unhappy conflicts that have prevailed . . . . The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the white man have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.
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> It is most unfortunate to try to measure this moral duty in terms of legal obligations . . . . The Indian problem is essentially a sociological problem, not a legal one."

—Justice Robert Jackson, *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 355 (1945)

> "One law shall be to him that is homeborn, and unto the stranger that sojourneth among you."

—*Exodus* 12:49

I. THE TENSION BETWEEN INDIGENOUS LAWMAKING AS A COLLECTIVE RIGHT AND THE UNIVERSAL HUMAN RIGHTS REGIME

A. PRIVATE LAWMAKING: CHALLENGE TO STATE SOVEREIGNTY

From time immemorial, long before the advent and rise to primacy of the system of nation-states following the Treaty of Westphalia in 1648, disputes have been resolved in accordance with legal rules and procedures developed in small, cohesive, insular communities organized and sustained along the lines of religion,[1] culture, ethnicity, guild,[2] and

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* LL.M. Candidate, Harvard Law School, 2001; J.D., University of Miami, 2000; Ph.D., Northwestern University, 1995. The author is grateful to Professor Clark Freshman of the University of Miami School of Law for his guidance and encouragement. He is also grateful to all his ancestors, whose sacrifices have become his opportunities.

1. *See* Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1750 (1997). Religious courts have been resolving disputes between members of their faiths by applying

territory.[3] The traditional Austinian vision[4] posits that law originates with the state as the command of the sovereign backed by the threat of force.[5] This cramped and artificially cabined position ignores the frequent incapacity of positive public regulations to overcome the contrary influence[6] of ubiquitous private and autonomous spheres of lawmaking to "penetrate all social ordering."[7] In fact, a welter of private frameworks that prescribe and proscribe the behaviors of particular groups coexists with official public law. On occasion these many and varied forms of private law (also known as autonomous, primitive, customary, or "folk law"[8]) challenge the authority of the state.[9] Totalitarian

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particular written aspects of religious law as well as religious custom for millennia; Jewish courts continue to do so in the United States. *See id.*

2. *See, e.g.*, Mikel v. Scharf, 444 N.Y.S.2d 690, 691 (N.Y. App. 1981). Justice has traditionally been dispensed not in state-sponsored forums but at the "primary institutional locations" of human activity.

3. Tribal justice lingers below the waterline of sovereignty in many nations across the globe. Recently a 28-year-old Australian aboriginal man, released after 20 months in prison for the homicide of his nephew in a drunken brawl, was subjected to traditional aboriginal punishment after a northern territory court agreed to recognize the traditional "payback" system of tribal justice. *See* Christopher Zinn, *Aborigines Win Back the Right to Swift Justice*, GUARDIAN (London), Dec. 5, 1997, at 19. His family speared him 14 times in his legs and beat him unconscious with a nulla-nulla war club. *See id.* After recovering, the happy man, now welcomed back into his tribe, indicated that he had accepted traditional punishment to "show my family I was sorry for what I did . . . . My skin (family) group made sure it was done in the proper way and my life was not in danger. I faced my family and community in the open. Now things can settle." *Id.* In response, an angry Shane Stone, Attorney General of the Northern Territory, stated that "payback" was "barbaric and unacceptable. There is no way we will have two laws up here." *Id.* To this, Justice Dean Mildren, the sentencing judge, responded, "The courts don't encourage payback, we don't say it's lawful, we don't wish to do anything to facilitate it. But on the other hand, when we know that it's going to happen we can't ignore it." *Id.* Tribal justice continues to be the principle method of dispute resolution in Haiti, Georgia, Albania, and Yemen, where a "tooth for a tooth" is the governing legal regime save for the payment of financial compensation, and it is a subsidiary method in Arab nations where the quasi-sanctioned method of redress for the stain on familial honor caused by the wayward conduct or the rape of its female members is the "honor killing" of these women and girls. *See* Douglas Jehl, *For Shame*, N.Y. TIMES, June 20, 1999, § 1, at 3.

4. *See* Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 328 (1993). The authors provide a broad definition that considers law an:

> existential condition in which men are carriers of rights and duties, privileges and immunities. No formal structure supporting the system of law need be visible. Those accustomed to seeing law only in its formal institutions, in terms of statutes, decisions, judges, legislators, and administrators miss the point. Law can be found any place and any time that a group gathers together to pursue an objective. The rules, open or covert, by which they govern themselves, and the methods and techniques by which these rules are enforced is the law of the group.

Id.

5. *See* Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 895-96 (1999).

6. *See* Weyrauch & Bell, *supra* note 4, at 334.

7. Weyrauch & Bell, *supra* note 4, at 327.

8. *See* Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 142-43 (1999). According to Seielstad, "folk law" is a:

> "socially defined group's orally transmitted traditional body of obligations and prohibitions, sanctioned or required by that group, binding upon individuals or subsets of individuals (e.g., families, clans) under pain of punishment or forfeiture." It is synonymous with customary law, unwritten law, indigenous law, living law, primitive

political systems have proscribed civil society and consociation with other interpretive communities entirely and rejected contending legal systems within their boundaries ipso facto. Liberal political systems have tended to fashion domestic orders more conducive to personal freedom and to the limited development of autonomous legal systems.[10] Nevertheless, much private lawmaking is colorable as a functionalist response to the desire for group cohesion and the satisfaction of fundamental human needs, such as cultural and ethnic expression.[11] Western liberals have branded elements of autonomous legal systems, whether the harshness of particular punishments, the perceived absence of due process or equal protection guarantees, or the expression of relations of intragroup domination,[12] as "contextually paranoiac and . . . counterproductive,"[13] even threatening to the majoritarian legal regime.[14] Western liberal

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> law, and a number of other terms . . . . The legal systems of other "folk" societies have historically been devalued and marginalized as "primitive," illiterate, or otherwise less-sophisticated than the Anglo-American legal tradition.

Id. (quoting FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA at xiii (Alison Dundes Renteln & Alan Dundes eds., 1994)).

9. *See* Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 691 (1993). Herz maintains that any worldview or value system in competition for the allegiance of the people with the dominant culture can undermine political and social stability and tends to do so in proportion to the legitimacy of the state as equal representative of all. *See id.* Moreover, for those states with clouded claims to territorial sovereignty, the threat of an internal collective indigenous legal identity with land claims and values contrary to those of the official state legal regime is particularly potent and not limited only to questions of legitimacy; the very existence of the state within its boundaries is called into question. *See id.* at 691-92.

10. *See generally* W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401 (1993).

11. *See* Weyrauch & Bell, *supra* note 4, at 399; *see also* Bill Maurer, *Writing Law, Making a "Nation": History, Modernity, and Paradoxes of Self-Rule in the British Virgin Islands*, 29 L. & SOC'Y REV. 255 (1995) (arguing that a "nation's law is one of the key components of a unifying nationalism [that] helps . . . define and then regulate our national selves; [f]or modern subjects, the ability to make law is the mark and preserve of independent political society and of the rational, modern individuals making it up").

12. *See supra* text accompanying note 3.

13. Reisman, *supra* note 10, at 410.

14. *See* Reisman, *supra* note 10, at 402. The private lawmaking of the Roma, also known as Gypsies, has come under considerable scrutiny in recent scholarship, with much criticism directed at the absence of Western notions of due process and equal protection in informal adjudications and punishments of breaches of Roma purity laws. In brief, Roma adjudication is concerned primarily with the well-being of the interdependent group and the minimization of legal contact with the state, even at the expense of what non-Roma might call due process and individual rights. *See* Weyrauch & Bell, *supra* note 4, at 389-94. For the Roma, the vindication of individual rights are so much less important than the reestablishment of the peace of a stateless community which has historically been subjected to persecution and even genocide and is now surrounded by foreign and hostile majoritarian cultures. *See* Weyrauch & Bell, *supra* note 4, at 389-94. Consequently, dissent as to the adjudication and punishment of group taboos is subordinated, along with traditional Western standards of fairness, to group cohesion. *See* Weyrauch & Bell, *supra* note 4, at 394. For a functionalist argument as to the substantive rationality of autonomous Roma lawmaking and its role in securing the survival of Roma society in host nations, see Weyrauch & Bell, *supra* note 4, at 391. Also see Reisman, *supra* note 10, at 402 n.5 ("Given that, over the centuries, the Roma have almost continuously been targets of discrimination and genocidal campaigns, the success of the Romani legal and political system in securing the group's collective survival is remarkable.").

creed has begun to concede the intimate nexus between culture[15] and law,[16] which advocates of private lawmaking stress as the wellspring of their systems of social regulation. The Western liberal-multicultural state has been unable to acknowledge that its public law is the cultural product

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15. *See* W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 25 (1996) (explaining the "rectitude process" of the New Haven School of International Law which maintains that "[e]ach culture, in its unique context, records . . . experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life"); *see also* Guy O. Faure & Gunnar Sjostedt, *Culture and Negotiation: An Introduction*, *in* CULTURE AND NEGOTIATION 1, 3 (Guy O. Faure & Jeffrey Z. Rubin eds., 1993) (defining the term "culture" as a "set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, or other groups and orient their behavior which is transmitted from one generation to the next and shapes interactions with others and the environment").

16. *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1607 (1991) For Grillo,

> "[d]isputes are cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kinds of remedies are acceptable." The process by which a society resolves conflict is closely related to its social structure. Implicit in this choice is a message about what is respectable to do or want or say, what the obligations are of being a member of the society or of a particular group within it, and what it takes to be thought of as a good person leading a virtuous life.

Id. (quoting Sally Engle Merry & Susan S. Silbey, *What Do Plaintiff's Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984)). Consequently, for those more suited to thinking of the community as the domain of conflict resolution and to incorporating the interests of the adversary in this process, the adversary system is contraindicated. *See id.*

of the individualist tradition[17] of its dominant social group[18] and is prone to cultural narcissism in relation to private legal systems.[19]

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17. *See* Mary Douglas, *Culture and Collective Action*, *in* THE RELEVANCE OF CULTURE 39, 44 (Morris Freilich ed., 1989). As a fundamental part of their cosmology, indigenous tribal social orders generally define everything as a public good from which no individual can be excluded and that traditional Indian tribes cannot conceive of individual claims to rights as existing independently of a membership stake in the collective. *See id.* In stark contrast, the methodological individualism of liberal Western political philosophy is so deeply ingrained in American legal culture that skepticism pervades any discussion of the roles of community and culture despite the historical contingency and cultural situatedness of much of Western legal scholarship. *See id.* As a result, it is essentially impossible for the Western mind to seriously entertain indigenous claims to collective legal rights. *See id.*; *see also* Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1760-62 (1999). Gupta further illuminates the genesis and legal significance of this philosophical disjunct as follows:

> Western thought originates with the isolated individual separated from organized society and concentrates on the relationship of the individual to the state. In the Western tradition of natural law, individuals voluntarily enter into a social compact in which individual autonomy is exchanged for peace, security, and protection provided by the sovereign. This transition to organized society inherently rests on the perception that the Hobbesian "state of nature" is inferior to and separate from civilization.
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> Rights are conceptualized as constraints on the government in favor of the individual, created from those powers not delegated to the sovereign. . . . Further, rights are considered limitations on the power of the state and good government is equated with regulating the state and not strengthening group affiliations.
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> Indigenous or tribal political systems, on the other hand, are "a web of reciprocal relationships without a separately institutionalized 'state,'" where kinship assigns roles to individuals "as if they were species in an ecosystem." Each individual plays multiple roles, and leaders are recognized for segments of the web-families, genders, generations-representing "countervailing responsibilities." This design facilitates the inclusion of all relevant parties in decisions . . . . In contrast, the Western conception leaves little room for these group affiliations or collective or societal rights outside the context of a nation-state.

Id. (quoting Russel Lawrence Barsh, *The Challenges of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 297 (1993)).

18. *See* Christine Zuni Cruz, *On the Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 567 (1999); *see also* Weyrauch & Bell, *supra* note 4, at 386-87 (noting that law "cements the cultural unity" of peoples, even in the American legal system where "[a]lthough American law presents itself as neutral, it still functions to . . . represent aspirational norms that are rarely fully realized, but instead hold out a promise . . . equality of all people, for example."); Reisman, *supra* note 10, at 415 (suggesting that "much of the way 'we' organize our individual and collective lives is neither natural nor particularly rational, but rather a cultural choice largely shaped by historical forces that we deem to be natural, necessary and, usually, right").

19. Cross-cultural observation and analysis of legal systems is difficult even for the most sympathetic researcher because "each of us is profoundly shaped, at levels of consciousness so deep that we are unaware of it, by our own culture's categories. We observe others in our terms. In those terms, others can seem incomprehensible or stubbornly and maddeningly irrational." Reisman, *supra* note 10, at 403. However, it is not only Western analysts who stereotype, make unsympathetic assumptions, or use non-reflective and domestically contingent methodologies and theoretical lenses to superimpose disfavorable value judgments upon dissimilar cultures. Emotional attachment to a familiar legal system and to a preconceived notion of other legal systems is common to all cultures, and yet so great is the power of law among all other disciplines to destroy and to sanction the destruction of other cultures, legal systems, and polities that "[n]owhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery—the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians." *See* KARL N. LLEWELLYN, THE BRAMBLE BUSH 44 (1930). The antidote to this transcultural proclivity requires a dispassionate and direct investigation of different cultures that transcends the individual capacities of most researchers; nevertheless, sympathetic comparativism requires that we "define ourselves neither by distancing

Consequently, liberal Western states are given to the reflexive and illiberal circumscription of subsidiary political and legal entities. As Reisman cautions, this reactivity obstructs the liberal state in its performance of the critical intellectual and governance task. This task is already complicated by the development of an interdependent and global civil society. Determining when, how, and to what extent minority groups claiming the right to exercise autonomous lawmaking authority may "discharge themselves from the reach of general community norms"[20] without compromising the liberal project of promoting respect for and observance of the universal human rights regime remains to be seen.

B. STATISM AND LIBERAL INDIVIDUALISM: IMPEDIMENTS TO THE ACCOMMODATION OF THIRD GENERATION RIGHTS CLAIMS

Attempts to accommodate minority group claims to cultural and legal autonomy within liberal multicultural states have, until recently, foundered upon the primary tenet of Western political philosophy—the conception of rights as inhering only in individuals and states.[21] Human rights jurisprudence has recently begun to reconsider the questions of indigenous group rights.[22] However, most human rights advocacy remains staunchly individualist and unabashedly uncritical of the imposition of external standards with "no . . . intrinsic claim for accuracy"[23] other than their Western and individualist pedigree, by which to evaluate certain divergent cultural and legal practices of minority groups. These and other unresolved "doctrinal questions about the incorporation of whole groups . . . into a system designed for protecting individuals from

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others as counterpoles nor by drawing them close as facsimiles but by locating ourselves among them." Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647, 653 (1998).

20. Reisman, *supra* note 10, at 415.

21. *See* Herz, *supra* note 9, at 695. Although there is variation between national legal systems, the Western legal tradition is generally individualist, adversarial, predicated upon self-interested representation by lawyers, and rooted in all-or-nothing frequently monetary-decisions by neutral factfinders on the basis of fixed, positive legal principles. As such, it is ill-suited to the exposition or redress of group claims, particularly those arising from historical conflicts with dominant groups acting without the official imprimatur of the state. For an exegesis of the Western/Anglo-American adversarial legal tradition, see Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 259-63 (1997).

22. *See* Lawrence Rosenn, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 YALE L.J. 227, 242 (1997) (book review) (establishing that early affirmations of the legal rights of indigenous peoples offered by "discovering" Europeans at the time of contact with the New World succumbed by the eighteenth century to a state-centered Eurocentric system no longer capable of accommodating indigenous peoples and their cultures as equals but well suited to disrespecting and eradicating them in the interests of "progress" and the fulfillment of a "divine mission"). Contemporary international law recognizes neither assertions of collective cultural rights by aboriginal peoples against state sovereignty, treaties between indigenous peoples and states, nor indigenous peoples' rights to self-determination. *See id.*

23. Weyrauch & Bell, *supra* note 4, at 395.

acts of the state"[24] perpetuate minority discontent and hinder the perfection, not only of orderly and just multicultural domestic polities, but also of the universal human rights regime.

This conflict is by no means unilateral. At the same time they are threatened by the competing claims of other lawmaking communities, indigenous peoples propagate a discourse that, by positing alternative visions and repositories of rights, including the right of collectives to self-determination, threatens the construction of a post-World War II universal human rights regime normatively grounded in the indivisibility of individual and communal rights.[25] The resulting tension between the desire of a self-determining collective unrecognized as a sovereign state to freely pursue its own economic, social, and cultural development on the one hand, and the moral and legal obligation of the recognized state within which the collective is located to apply international human rights conventions such as the Universal Declaration of Human Rights,[26] the International Convention for Civil and Political Rights (ICCPR),[27] and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women,[28] has never been effectively resolved.[29]

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24. Ruth L. Gana, *Which "Self"? Race and Gender in the Right to Self-Determination as a Prerequisite to the Right to Development*, 14 WIS. INT'L L.J. 133, 151 n.96 (1995).

25. *See* Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1765 (1997) (enumerating the inconsistencies and historical ironies in federal Indian law).

26. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess. (1948).

27. *See International Covenant for Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 53; U.N. Doc. A/6316 (1966) [hereinafter ICCPR] (requiring protection of individual rights without regard to race, color, or sex and mandating gender equality in the exercise of all civil and political rights while at the same time guaranteeing the right of persons belonging to ethnic, religious, and linguistic minorities to enjoy their own culture and the right to preservation of customs and legal traditions).

28. *See Convention on the Elimination of All Forms of Discrimination Against Women*, 19 I.L.M. 33, 34 (1980) (stating in its preamble that "the welfare of the world and the cause of peace require the full participation of both men and women").

29. While it is arbitrary and potentially prejudicial to international order and peaceful relations to suggest that groups can and should gain rights only by becoming states or dominant majorities within states, "intermediate" notions of communal rights have not thus far gained sufficient currency in international rights discourses. However, a number of scholars have employed the term "interpretive community" in an attempt to bridge the space between the rights of individuals and the rights of states into which, heretofore, the rights of collectives have been unable to fit. *See* Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1004 n.2 (1995) (arguing that each Indian tribe is an interpretive community with the right to self-definition and -determination); *see also* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141 (1989) (suggesting that indigenous groups, despite their lack of formal legislative and executive institutions, are distinct "interpretive communities" autonomously entitled to develop, without interference, "a point of view or way of organizing experience that share[s] individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance [a]re the content of the consciousness of community members who were therefore no longer individuals, but insofar as they were embedded in the community's enterprise, community property."). By deploying the concept of interpretive communities, Fish and Newton open the door to reconsidering indigenous communities as political entities to whom individual obligations of community members are owing even at the limited expense

None of the various international human rights instruments, including the Draft Declaration on the Rights of Indigenous Peoples,[30] has overcome state interference or harmonized normative conflicts over the extent to which the legal systems of minority groups exercising claims to self-determination ought to be permitted to abridge or limit the fundamental human rights of individual members.[31] Whether traditions of gender discrimination within indigenous communities ought to take legal precedence over national or international human rights guarantees couched in individualist language, and whether tribal members ought to be free to assert interests contrary to the interests of their tribes even to the extent of being able to "opt out" of tribal decisions[32] (i.e., to be

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of individual freedom or autonomy. However, although by this construction indigenous communities are analogous to states not only are Western liberal multicultural states far more supportive of individual autonomy than are most indigenous communities, but any reconception of sovereignty which loosens the requirements threatens the present states-system and the prerogatives attendant.

30. *See United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples* [hereinafter *Draft Declaration*], 34 I.L.M. 541, 550 (1995) (adopted Aug. 26, 1994) (codifying as a matter of customary international law collective rights which both limit state discretion and impose affirmative duties upon states vis-a-vis their indigenous peoples). The United Nations Economic and Social Council created the Working Group on Indigenous Populations in 1982 for the express purpose of developing international human rights norms for the protection of indigenous peoples; the Draft Declaration, the result of more than a decade of concerted but frustrated efforts, establishes in relevant part the right of indigenous peoples to employ their own legal systems in Article 13, which maintains that "indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies." *Id.* at art. 13.

31. *See* Rosenn, *supra* note 22, at 247. The World Conference on Human Rights held in June 1993 in Vienna advocated the accommodation of national and regional particularities in the international human rights norm-setting process and in the development of customary international law on human rights. *See Draft Declaration, supra* note 30. However, the specific question of whether, to what extent, and on what basis indigenous cultural practices ought to be accorded consideration in this process of accommodation has been held largely in abeyance and left to states' interpretations of existing international human rights conventions and to the development by the states-members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities specifically and the U.N. General Assembly generally of the Draft Declaration. *See Draft Declaration, supra* note 30 and accompanying text.

32. *See* Freshman, *supra* note 1, at 1759-60. Contemporary theories of multiculturalism maintain that the cultural values of communities, particularly those, which contribute to group survival, are inherently entitled to mutual respect. However, Freshman builds upon the political and legal notion of informed consent to suggest that a "sincere attempt to apply [certain] cultural values may subordinate individuals," particularly those who, after reasoned deliberation, either elect not to participate in the choices and arrangements of their tribal communities or elect to accord their allegiance to other communities constituted on a basis other than tribal membership. Freshman, *supra* note 1, at 1759.

Similarly, Reisman takes to task the Historicist School. *See generally* Reisman, *supra* note 10. Reisman does not view law as the product of conscious allocative choices subjected constantly to the destructive influences of intragroup power and oppression both formal and informal. *See* Reisman, *supra* note 10, at 401. Rather, he views law as a predestined evolutionary end-product uniquely and mystically shaped by historical group experiences. *See* Reisman, *supra* note 10, at 401. Reisman teaches that the "[indigenous law] should be allowed to grow, at its own pace and according to its own preordained genetic program," and "erstwhile social do-gooders" should "look but don't touch," regardless of the "ugly violence that is [sometimes] applied." Reisman, *supra* note 10, at 401, 407-08. For adherents of the Positivist School, there are few if any permanences of group differences in culture and behavior, and "[a]lthough group survival is obviously the sine qua non of collective life, . . . it is, by itself, not enough for appraisal." Reisman, *supra* note 10, at 410. For Reisman and others, while "[i]t would be . . . arrogant and preposterous . . . to reject the practices of others simply because we do not agree with or like them . . . [t]he pertinent question is not the . . . compatibility [of others'

able to participate in the process of self-determination as individuals),[33] have proven to be thorns in the sides of the architects of international rights regimes in recent years.[34]

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practices] with ours, but whether their application is likely to precipitate consequences that are inconsistent with or violative of international human rights standards." Reisman, *supra* note 15, at 34. Indigenous legal systems "can simultaneously promote survival and pursue policies that are extremely costly to some [group] members." Reisman, *supra* note 10, at 410. When this occurs, whether by direct abuse or by denying them information to prevent them from discovering the "utility-decreasing nature of . . . group . . . organization . . . [or] outdated but entrenched customs," to Positivists state intervention may unfortunately be necessary in defense of universal and transcultural norms. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 143-44 n.24 (1996).

33. *See* Gana, *supra* note 24, at 135, 151-52 (arguing for reconceptualization of "self-determination" as an individual human right against which to hold collectives accountable for the treatment of women and other dissenters).

34. In international judicial fora the jurisprudence is confused. In 1977, the Maliset tribe stripped Sandra Lovelace of her membership as a result of her marriage to a non-Indian. *See* Lovelace v. Canada, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, Annex 18, at 166, U.N. Doc A4/36/40 (1977). Although Maliset men who married non-Indian women were not stripped of membership, the Canadian court rejected a gender discrimination claim on the ground that in accordance with the Canadian Federal Indian Act (Act), a measure passed to protect the Canadian Indian minority in compliance with the mandate under Article 27 of the ICCPR granting minorities the freedom to "enjoy their own culture, religion, and language," the Maliset were entitled to the widest latitude of discretion in the management of tribal affairs. *Id.* at 166-67. However, the U.N. Human Rights Committee found the broad interpretation of the Act violated Lovelace's Article 27 rights, noting that Article 27 only provides an individual right to participation in a group, not a group right per se, and suggesting that states have the responsibility to see that group rights do not impinge individual rights. *See id.* at 173-74.

However, Ivan Kitok, a member of the indigenous Sami, was prevented from herding reindeer by his former village, a decision upheld by Swedish courts on the ground that Swedish law granted considerable autonomy to the Sami on membership matters. *See* Kitok v. Sweden, U.N. GAOR, Hum. Rts. Comm., 43d Sess., Supp. No. 40, Annex 7(G), at 221, U.N. Doc A/43/40 (1988) (views adopted July 27, 1988). When Kitok appealed to the U.N. Human Rights Committee, alleging a violation of his right to enjoy his own culture under Article 27 of the ICCPR, the Committee upheld the Swedish ruling, stating that the interests of the group could sometimes outweigh the interests of an individual. *See id.* at 230.

The political debate is lively in the U.S. domestic arena. In 1978, Julia Martinez, a member of the Santa Clara Pueblo, brought discrimination charges in federal court against her tribe after a tribal ordinance, which provided that children of female (but not male) members who married outside the tribe would not be tribal members, barred her child from tribal membership. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52-53 (1978). On appeal the Supreme Court held that U.S. law did not create an implicit cause of action to challenge a tribal ordinance on equal protection grounds as judicial "intervention" would undermine the authority of Indian tribes, which had been permitted by Congress to retain limited sovereignty, to include determining their own membership. *See id.* at 64, 72. Enraged white feminists suggested that a tribe that discriminates against women is not entitled to acceptance within a multicultural, liberal state; some even argued that Indian culture should be "sanitized" and "restructured" legally to accord women equal protection as a matter of U.S. constitutional law. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 725 (1989) (expressing apprehension over the "ease with which the Supreme Court . . . assumed the 1939 Ordinance to be an artifact of Santa Clara sovereignty"); *see also* Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 169-70, 179-84 (1991) (arguing "[Indian] women [are] virtually paralyzed within a system that subordinates women" and proposing a federal law requiring that all tribes amend their constitutions to accord Indian women equal protection). However, Indian feminists decried the assumption that perspectives on equality and oppression could be conflated as well as the essentialist distortion that constructed female identity as more important than tribal identity despite an abject cultural ignorance of "Indianism." *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588, 593 (1990). Indian feminists stressed not only that the power of the tribe to determine its membership was a primary constituent of sovereignty but that Indian

Most non-indigenous Western scholars, imbued as they are in the spirit of individualism and public law universalism,[35] would accept the collective rights of indigenous groups over their members, if they entertain questions of group rights at all,[36] only to the extent that such authority is indispensable to the protection of individual rights.[37] For Reisman, the legal practices of indigenous groups that far too frequently impose deprivations upon "weaker members of the group" are "no longer tolerable" and can "no longer be insulated from appraisal simply and exclusively by invoking talismanic terms like 'sovereignty,' 'domestic jurisdiction,' 'tradition,' 'history,' the supposed wills of assorted divinities, 'the way we have always done things,' . . . 'autonomy,' or as alleged preconditions for 'group continuity.'"[38] In sum, to the individualist jurisprudence, the practices of all groups must be appraised in terms of the international code of human rights and adjusted in conformance with that code.[39]

C. INDIGENOUS COLLECTIVISM: CLARION CALL FOR COLLECTIVE RIGHTS

By contrast, for indigenous scholars and advocates, the individualist methodology of human rights discourses not only forcibly imposes its own cultural values[40] but, by bifurcating individual and collective rights,

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"partnership" societies accorded women coequal status despite role differentiation and frequently elevated female members to leadership positions. *See* Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 88-96 (1995) (arguing that since 67 Indian women had served as heads-of-state by 1981, non-Indian intervention on behalf of Martinez was unnecessary; female tribal members could be protected via traditional gender relational systems while preserving tribal cultural values and not disrupting viable Indian polities).

35. *See* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 604 (declaring that public law internationalism should deem cultural practices such as female genital mutilation (FGM) to be "basic challenge[s] to the structure of public law" and to an aspirational regime of international governance despite the fact that FGM is practiced consensually by individuals within the private domain).

36. For an exposition of the liberal tradition of dismissing group rights, see, for example, Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, 29 WORLD POL. 343, 346-49 (1977) (discussing the contributions to the development of liberal political philosophy of Hobbes, Locke, and Rousseau).

37. *See* Reisman, *supra* note 10, at 416.

38. Reisman, *supra* note 10, at 416-17.

39. *See* Reisman, *supra* note 10, at 416.

40. *See* Resnik, *supra* note 34, at 727. According to the traditional political theory of liberal democratic governance:

> Liberal democracy offers majoritarianism with the side constraints of individual rights. But in a majoritarian society, some must win and some must lose, and if pervasively dissimilar cultures are yoked together within a single majoritarian state, the minority culture will lose systematically. For these minority cultures, the promise of majoritarianism is not one of self-determination; it is rather one of subjection to an alien power.
>
> Liberal democracy, in other words, may offer the greatest possible opportunity for disparate groups to live together amicably within a single nation-state, but the very mechanisms that make cohabitation possible for some cultures—majoritarianism, the franchise, and individual rights . . . make cohabitation impossible for others. Liberalism may

prevents indigenous communities from securing benefits, enjoyable only in collectives, against social disruptions triggered by dissatisfied or deviant (former) members.[41] These benefits include: self-determination, religion, law, traditional relational values, and other distinct aspects of culture and sovereignty.[42] According to this contending theory of rights, simply because there is a "disparity between the legal institution[al] perception of what is 'right' and the perceptions of those subject to the law," there is no reason to invalidate the norm which undergirds the sense of rectitude.[43] Although indigenous peoples are eager to escape the poverty under which they frequently labor, forces operating to improve their material conditions by requiring their cultural and legal assimilation as a precondition,[44] threaten a superordinate value—group identity. In the refusal to recognize a regime of collective rights as the principal defensive weapon for indigenous peoples to wield against this onslaught, indigenous scholars and advocates find the seeds of ethnocide. Ethnocide is defined as "any act which has the aim or effect of depriving [indigenous people] of their ethnic characteristics or cultural identity [or] any form of forced assimilation or integration, [such as the] imposition of foreign life-styles."[45]

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seek to make culture irrelevant to political status, but ultimately liberalism is itself a culture, one that imposes its own orthodoxy.

David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 423-24 (1994).

41. *See* Herz, *supra* note 9, at 698. Many of the collective rights which indigenous groups actively defend cannot be disaggregated and enjoyed as individual rights, and thus any institutional attempts to reconfigure them to fit within the individual rights lexicon is predestined to failure. As Herz notes:

> [E]ssential elements of communality, those that make group association valuable to the human experience, tend to operate as constraints on the individual; they therefore present a direct affront to the individualist leanings in American and international law. Such communal elements include socialization processes, kinship structures, moral standards, and community-based religions. Because these are things individuals cannot develop except in relation to an integrated group, group claims in support of them cannot readily be translated into the language of individual rights. They present a qualitatively different assertion of right, so that an individual rights perspective, no matter how enlightened, can never be logically sufficient to protect the value of communality.

Herz, *supra* note 9, at 699.

42. *See* Herz, *supra* note 9, at 709.

43. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 74 n.114 (1997).

44. Weyrauch & Bell, *supra* note 4, at 371 (noting that while indigenous groups have demonstrated a remarkable capacity for and acceptance of adaptation, which implies adjustments necessary to survive as a group and cope with a surrounding hostile environment, they are abjectly unwilling to commit to a program of assimilation, which implies the demise of their distinct cultures). It is the personal experience of the author that many indigenous people believe that if further adaptation is necessary, it ought properly to be the duty of the majority culture.

45. *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous People*, at 6, P5, U.N. Doc. E/CN. 4/Sub. 2/1989/33 (1989). Despite the failure of international human rights instruments and institutions to resolve the conflict in favor of indigenous rights, several commentators insist that these are the most useful tools in the defense of indigenous rights against increasing state encroachment upon these rights, particularly in those states with independent judiciaries and legal systems which incorporate international customary law. *See*,

D. PRIMARY CHALLENGE TO INTERNATIONAL GOVERNANCE IN THE NEW MILLENNIUM

The significance of the *Kulturkampf* threatening liberal states and the international human rights regime they champion over the cultural claims of their indigenous collectives can be summarized as follows:

> [International human rights scholars] generally make two sorts of arguments, explicitly or implicitly, about cultural differences . . . . First, that cultural differences are not that big a deal and one might safely assume that they will either stay below the waterline of sovereignty, perhaps within the realm of personal preferences, or will yield softly to the pressures of assimilative globalization; and second, that they are a big deal and may well limit the ambit of universal or internationalist governance.[46]

For liberal multicultural states, one of the most pressing tasks of the new millennium will be the resolution of the uncomfortable dilemma now facing them: how to preserve and respect their indigenous cultures without drawing a *cordon sanitaire* about indigenous communities and sealing off their divergent cultures from interaction with majority polities or worse—compromising the universal individualist human rights agenda.[47] The solution may well be located in none other than the principal proponent of the global human rights legal regime. Yet it is ironic that in perhaps no other contemporary nation-state is the cultural conflict between the individualist and the collective notions of rights so clearly manifested in the domestic legal regime as it is in the sole remaining superpower. Carefully constructed national myth insulates mainstream Americans from the historical and contemporary realities of the cultural,

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e.g., Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (1992). However, others insist that only more extensive structural protection beyond that guaranteed by liberal individualism, such as collective self-determination and group representation in legislatures, can defend against ethnocide. *See, e.g.*, Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990); *see also* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660.

46. Kennedy, *supra* note 35, at 615-16.

47. An atmosphere of distrust and suspicion, bred of centuries of maltreatment and abuse of indigenous peoples by a host of states only recently committed to liberal multiculturalism and indigenous rights, will complicate the attempt to merge these two seemingly dichotomous positions into a unified theory of liberal rights. Many indigenous peoples, convinced that liberal political theory and international law are structurally unresponsive to indigenous histories and cultures despite the beneficent intentions of many of their advocates, will condemn any such attempt to generate a unified theory as little more than a statist ploy to pay lip service to indigenous claims while coopting indigenous elites and gradually completing the assimilation of indigenous peoples into mainstream bodies-politic. For an explanation of this impediment to constructive solutions to the fundamental problem of international governance, see Rosenn, *supra* note 22, at 251-58.

political, economic, and legal oppression of the indigenous people[48] of the United States.[49]

II. THE GREAT DISPLACEMENT: THE ANGLO-AMERICAN LEGAL SYSTEM CONFRONTS INDIGENOUS LEGAL SYSTEMS

A. WORLDS OF DIFFERENCE: CULTURAL INFLUENCE UPON LEGAL SYSTEMS

Although the more than five hundred tribes of Indians were recognized under international law as sovereign nation-states prior to the formation of the United States,[50] with the birth of the American nation an unremitting cycle of federal policies designed to "civilize" the indigenous inhabitants has compromised their economic independence and political self-determination. While genocide, land expropriation, population transfers, cultural assaults, and the institutional forces of politico-economic dependency[51] "severely tested the adaptive insights

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48. In this article the terms "Indian" and "indigenous" will be used to describe the living descendants of the aboriginal inhabitants of the United States. Such people generally refer to themselves as members of their particular nation, tribe, community, pueblo, or village, but, as the Indian scholar Robert Porter notes, if the occasion arises to refer to themselves as part of the broader population of indigenous peoples,

> the chosen term is invariably "Indian." "Native American" is a term of relatively recent origin and most likely reflects the "politically correct" trend to be inclusive of all native people within American society. In my view, the term perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity, as in the case of African-Americans or Irish-Americans.

Porter, *supra* note 21, at 237 n.7.

49. For a thorough explanation of the origins and functions of the American national myth as the "divine" inspiration for the birth and construction of the American nation, see Ward Churchill, *American Indian Self-Governance: Fact, Fantasy, and Prospects for the Future, in* AMERICAN INDIAN POLICY: SELF-GOVERNANCE AND ECONOMIC DEVELOPMENT 37, 39 (Lyman H. Legters & Fremont J. Lyden eds., 1994).

50. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 228-29 (1994).

51. For a thorough and unflinching historical review of U.S.-Indian relations, see THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984); *see also* WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 5-15 (1971) (demonstrating the destructive function of 200 years of federal Indian law which authorized and sanctioned legislative and executive policies, including coercive and fraudulent treaty-making, genocide, forcible population transfers, forcible cultural annihilation, destruction of traditional tribal societies and legal systems, and the creation of politico-economic dependency). Specific federal legislation, including the Indian Removal Act of 1830, the General Allotment Act of 1887 [hereinafter Allotment], the Wheeler-Howard Indian Reorganization Act of 1934 [hereinafter IRA], House Concurrent Resolution 108 of 1950 [hereinafter Termination], and Public Law 959 of 1950 [hereinafter Relocation], imposed military, political, economic, legal, and philosophical limitations on indigenous rights to sovereignty and self-determination. *See* LAURENCE A. FRENCH, THE WINDS OF INJUSTICE: AMERICAN INDIANS AND THE U.S. GOVERNMENT 45-74 (1994). French described the resulting holocaust:

> For more than five hundred years attempts have been made to exterminate, assimilate, or otherwise eliminate Native Americans from the American hemisphere. Their privation

and skills"[52] of Indian tribes in their struggle to remain in existence as free self-determining peoples,[53] it has fallen to federal Indian law, perhaps more than any other policy instrument, to sanitize the conquest of the Indian people by European invaders and justify their colonization. Moreover, it is precisely the many layers of difference between traditional Indian justice systems and the Anglo-European justice system that provided the point of entry for this process of substitution of legal systems.

B. THE PROTOTYPICAL INDIAN LEGAL SYSTEM

In brief, traditional Indian tribal society[54] permits no separation between the civil and the sacred, and spiritual significance touches every facet of life, including law.[55] Moreover, for Indian tribes[56] law, together with language, music, race, ethnicity, religion, and worldview, is a

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> knows no equal in American history. No other group within the United States has been subjected to such cruel, harsh, and deceptive exploits at the hands of dominant society and for such a long period of time. Massacres at the hands of military and civilians, slavery, wars, removal, treaty deceit, starvation, disease, genocide, forced sterilization, and cultural genocide are some of the methods used in the Euro-American effort to destroy the native peoples and their cultures in the American hemisphere.

Laurence Armand French, *Native American Repriations: Five Hundred Years and Counting, in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 241 (Roy L. Brooks ed., 1999).

52. Valencia-Weber, *supra* note 50, at 259.

53. *See* Steven Haberfeld & Jon Townsend, *Power and Dispute Resolution in Indian Country*, 10 MEDIATION Q. 405, 408 (1993).

54. *See* Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations, in* PROPERTY RIGHTS AND INDIAN ECONOMIES 5, 15 (Terry L. Anderson ed., 1992) (noting that in the pre-Columbian era indigenous tribes were almost exclusively loosely-joined political organizations, which depended for their physical and organizational survival upon the diligent contributions of their entire memberships and thereby required the voluntary consensus in all fundamental decisions of all their members); *see also* John H. Moore, *Political Economy in Anthropology, in* THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS 3 (John H. Moore ed., 1993) (explaining that to the extent that a central tribal organization could be said to exist, it functioned solely to coordinate activities and to redistribute resources to fill gaps in uncertain political economies and that to the extent "leaders" were chosen to make decisions these individuals were required to advise, consult, and attain unanimity among those they "led"); William N. Fenton, *Leadership in the Northeastern Woodlands of North America*, 10 AM. INDIAN Q. 21, 22 (1986) (noting that an absolute principle of consensus some scholars label "democratic extremism" developed to screen against unwilled radical changes which might damage physical safety or traditional integrity or threaten tribal solidarity). After contact with Euroamericans, tribal organization evolved into a form of council democracies in which a small cohort of elders were selected on the basis of a capacity for good judgment and experience to provide a more centralized leadership function, and with that role differentiation was introduced. *See* Roback, *supra* at 15. Nevertheless, although a system of well-elaborated individual responsibilities replaced the earlier mode of production the principles of consensus, unanimity, and conflict avoidance were preserved, as what might be deemed the "Western" concept of individual rights was perceived as threatening to the collective good of the tribes. In sum, Indian tribes prior to conquest were egalitarian political structures that concentrated collective energies upon the attainment of harmony between all elements of their social life. *See* Roback, *supra* at 15.

55. *See* Herz, *supra* note 9, at 703.

56. Given the number of tribes (more than 400 recognized and an additional 100 unrecognized) as well as their heterogeneity, it is easy to overgeneralize when making broad assertions about their commonalties; nevertheless, many tribes share certain fundamental organizing principles and it is possible to discuss them in limited general terms without compromising their uniqueness.

primary constituent of their collective and communal culture.[57] In the traditional indigenous conception, law is not of human construction but is rather "something fundamental that has existed from the beginning of time, providing spiritual and emotional thought and guidance. Law leads people to correct themselves and restore harmony. Law is the source of a healthy, meaningful life, and thus 'life comes from it.'"[58]

Although no Indian tribe had codified a body of written law as of 1776, many tribes had a traditional and customary "law . . . derived from rules of conduct and attitudes of the mind concerning their kinship system."[59] The purpose of such law was not to punish offenses, but to condition members to adhere to a sacred system of well-elaborated individual duties and responsibilities and thereby maintain tribal values of order, harmony, and peace within their tightly interrelated and interdependent communities.[60] Consequently, traditional indigenous legal systems emphasized communication, accountability, truth, restoration, forgiveness, and integration of the offender back into the community.[61] As a result, disputes within the tribe were typically resolved not in formal institutions using formal adjudicative procedures, but rather with the aid of respected elder members of the tribe who would guide the parties to a compromise restorative of the community. The compromise would encourage them to disregard blame in favor of focusing on tribal values and the reestablishment of peace, relationships, and harmony.[62] In this traditional Indian dispute resolution model, advice was given to people to aid them in meeting their communal responsibilities. Apologies were requested and given, and symbolic economic restitution was made.[63]

Quite simply, punishment was almost invariably a hinderance to the mission of rehabilitation and restoration of communal harmony.[64] In

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57. *See* Zuni Cruz, *supra* note 18, at 566.

58. Costello, *supra* note 5, at 895-96; *see also* Valencia-Weber, *supra* note 50, at 228-29 (explaining why traditional indigenous perspectives on law, derived from origins in a complex and challenging natural world where community and cooperation were essential preconditions for survival, establish restoration of intratribal harmony and balance as the overarching goal of all Indian dispute resolution).

59. *See* Ken Traisman, *Native Law: Law and Order Among Eighteenth-Century Cherokee, Great Plains, Central Prairie, and Woodland Indians*, 9 AM. INDIAN L. REV. 273, 274 (1981) (quoting John Philip Reid, *The Cherokee Thought: An Apparatus of Primitive Law*, 46 N.Y.U. L. REV. 283-84 (1971)).

60. *See id.*

61. *See* Costello, *supra* note 5, at 896.

62. *See* Porter, *supra* note 21, at 254.

63. *See* Diane LeResche, *Editor's Notes, Native American Perspectives on Peacemaking*, 10 MEDIATION Q. 321, 322 (1993); *see also* Traisman, *supra* note 59, at 282 (describing how among the Central Woodlands tribes mediation was often performed by elders to determine the specific amount to be paid in restitution, and, as an illustration of the flexibility and creativity of this process, noting that a murderer was required to marry the widow to compensate for her loss).

64. Nevertheless, although behavior was not governed by published laws enforced by police, courts, and jailers, a sense of communal responsibility buttressed by powerful unwritten social codes deterred and punished most aberrant behavior. Public opinion, expressed by ostracism (a fate

sum, Indian tribal justice systems relied upon oral custom and unwritten rules transmitted intergenerationally to establish appropriate conduct and resolve disputes. "[T]hough it appeared to the casual white observer that anarchy reigned,"[65] Indian tribes produced a clearly understood jurisprudence developed by an absolute consensus and reinforced by a pervasive religion, which functioned despite the absence of the "paraphernalia of European civilization."[66]

C. THE ANGLO-AMERICAN ADVERSARIAL SYSTEM

The radically different Anglo-European model imported by discovering nations focused on individual rights, the placement of the burden of proof on the accusers, and the punishment and removal of the offender from the community by imprisonment.[67] The absence of

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described as "worse than death" in that it deprived the individual of means of material and emotional support), shunning, and ridicule and supported by the fear of disgrace, kept law and order; reciprocal arrangements for support aided in the honoring of restitution agreements. *See* Traisman, *supra* note 59, at 275.

65. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 11 (1966); *see also* Seielstad, *supra* note 8, at 140 (relating the intensity of emotion with which traditional Indians cling to their legal systems as an inherent part of their culture: as she relates the words of retired Navajo Nation Supreme Court Justice, Tom Tso, "What h[eld] us together [wa]s a strong sense of values and customs, not words on paper. I am speaking of a sense of community so strong that, before the federal government imposed its system on us, we had no need to lock up wrongdoers.").

66. WASHBURN, *supra* note 51, at 40. The development of Indian tribal society in the absence of formal legal institutions does not imply that Indian tribes were perpetual models of harmony. Still, prior to the Euroamerican arrival, a system of dispute resolution existed in which, despite the absence of coercive centralized authority, enforceable economic sanctions, supported by reciprocal arrangements for communal support including the severe sanction of ostracism, could be imposed via procedures most similar to a blend of contemporary mediation and arbitration. *See* WASHBURN, *supra* note 51, at 40-41. Remarkably, however, the guilt or responsibility of the parties was almost never at issue, whereas the sole basis for contention was typically the amount of restitution to be paid to the claimant and the sole method for resolving the dispute was the negotiated consensus of the parties: no member of the tribe would presume to impose a solution and individuals were simply not conceived of as possessing adjudicatory powers. *See* Costello, *supra* note 5, at 878 (noting that while most disputes were resolved with symbolic economic exchange unrelated to market values, serious disputes threatened to disrupt the life of the entire tribe; to resolve such controversies required either the interposition of family members or the assistance of "peacemakers" who relied upon their position as respected elders to offer moral exhortation derived from community values and legendary histories geared toward mediating intragroup hostility and re-establishing communal consensus). In sum, underpinning the traditional Indian dispute resolution model was the notion that indigenous communities were organic. These communities horizontally constituted egalitarian entities bound to coexist with nature or perish. For the tribe to function, balance and harmony had to govern intra-tribal relationships. In other words, disputes invariably opened rifts in the tribe and thus required healing as part of their solutions, not only of the parties directly affected but for the entire tribe *qua* tribe.

67. *See* The Honorable Robert Yazzie, *"Hozho Nahasdlii"—We are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 120 (1996) (contrasting European legal systems, which are vertical in that they are built upon coercive and hierarchical institutions of power managed by elites, with traditional Indian legal systems that are predicated upon a horizontal scheme built upon egalitarianism and kinship relations and within which coercion and force are strictly proscribed and reciprocity in dealings in essential); *see also* Zuni Cruz, *supra* note 18, at 595 (distinguishing traditional indigenous legal systems, which emphasize "accountability, truth, restoration, forgiveness and integration of the offender back into the community," with adversarial legal systems that stress the right to remain silent, the placement of the burden of proof on accusers, and removal of wrongdoers from communities).

easily observable institutions and written procedures and records within the traditional tribal system made it easy for the conquerors to reach the self-serving conclusion that the Indian tribes were without law and justice.[68] This was a precursor to the eradication of traditional indigenous justice and the cultural constituents of Indian tribal justice systems in favor of the Anglo-European model as a tool of disenfranchisement, domination, and assimilation.[69]

D. FEDERAL INDIAN LAW: ENGINE OF DESTRUCTION

Prior to the late eighteenth century, Indian tribes were able to negotiate their relations with European powers from a position of strength, and tribal dispute resolution was unaffected by the Anglo-European model even as tribes ceded land to the United States. However, by the dawn of the nineteenth century the military balance shifted in favor of the United States and it became possible and practical to silence the competing indigenous legal discourse on the territorial fringe with the dominant jurisprudence of federal Indian law. Federal Indian law, though tempered by the beneficence of Chief Justice Marshall, remains "inextricably rooted in colonial notions that are simply inconsistent with any plausible contemporary normative universe."[70] Individual statutes and treaties, many of which were procured by fraud and duress,[71] provided for piecemeal federal prosecution of crimes by Indians, but in 1817 Congress extended the web of federal jurisdiction to crimes committed on reservations by non-Indians.[72]

In the 1830s the Supreme Court established that Indian tribes were nothing more than "domestic dependent nations" under the "tutelage" of the United States, which, as their trustee,[73] was obligated to take

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68. *See* Zion & Yazzie, *supra* note 43, at 56-57 (offering an enriched account of the historical basis for the ancient international practice of recognizing the validity and legitimacy of indigenous law and of allowing distinct peoples to be governed by their own law); *see also* ICCPR, *supra* note 27, art. 27, at 56 (guaranteeing the right of persons belonging to ethnic, religious, or linguistic minorities to "enjoy their own culture" and the right to "preservation of customs and legal traditions").

69. *See* Porter, *supra* note 21, at 254 (noting that only after discrediting the very different indigenous regime of property rights as unworthy of respect, could Euro-American colonizers legally ratify expropriation of Indian land and displace Indian culture, to include indigenous methods of dispute resolution, without moral reprobation). Social Darwinism eventually made major theoretical contributions to ethnocentric biases later confirmed by Western predominance over indigenous legal systems.

70. Frickey, *supra* note 25, at 1779.

71. *See* FRANCIS P. PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMOLY 1 (1994).

72. *See* Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (considerably revised and codified at 18 U.S.C. § 1152 (1994)). Nevertheless, crimes committed by Indians against other Indians were as yet reserved to exclusive tribal jurisdiction.

73. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (holding that "it may well be doubted whether . . . tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly . . . be denominated

affirmative steps to provide for their maintenance under what came to be known as the "trust responsibility." Thus, the door was open to further reduction in tribal sovereignty. By the time the smoke of the last of the Indian Wars cleared, an organized and concerted drive, led by a constellation of religious organizations, "friends of the Indian," the Bureau of Indian Affairs, and others endowed with a *mission civilisatrice*,[74] called upon Congress to extend the coercive power of the entire body of federal criminal law to the reservations. As Secretary of the Interior Carl Schurz put it in an 1879 report to that body, the theory was that "[i]f the Indians are to be advanced in civilized habits it is essential that they be accustomed to the government of law, with the restraints it imposes and the protection it affords."[75]

E. CROW DOG: BEGINNING OF THE END OF INDIGENOUS LEGAL AUTONOMY

Nevertheless, the right of Indian tribes to operate their own justice systems and dispute resolution mechanisms was still intact, save for the removal of virtually all tribal jurisdiction over non-Indians, until the political aftermath of the 1881 case of *Ex parte Crow Dog*[76] swept away this remnant of sovereignty.[77] Spotted Tail, an authoritarian Brule Sioux chief who had staked his political fortunes on the policy of accommodations with federal authorities, was shot and killed on the reservation by his subchief and political rival Crow Dog. Crow Dog, in contrast, derived his allegiance by traditional consensus of those Brule opposed to dependence. The day after the shooting, the tribal council ordered an end to the trouble and dispatched peacemakers to both families. After a traditional peacemaking ceremony, the family of Spotted Tail agreed to accept a payment from Crow Dog of $600, eight horses, and one blanket to resolve the dispute.[78] Despite the satisfaction of the entire Brule tribe

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domestic dependent nations . . . in a state of pupilage . . . look[ing] to our government for protection; relying upon its kindness and its power; appeal[ing] to it for relief to their wants; and address[ing] the president as their great father"); *see also* Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (establishing an explicit treaty-based obligation for the U.S. to uphold treaty obligations and act as trustee on behalf of Indian tribes).

74. *See* Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 229 (1989).

75. *Id.* at 224.

76. 109 U.S. 556 (1883)

77. *See Ex parte* Crow Dog, 109 U.S. 556 (1883).

78. *See* Harring, *supra* note 74, at 205 (citing BLACK HILLS DAILY TIMES (Sept. 16, 1881)).

> In the Case of Crow Dog, as in all other offenses of a like nature, the relatives of the deceased and his own meet together in council, talk the damages over until they come to some agreement as to what they should be, and have an understanding as to how much property shall be given to make peace. The pipe of peace and fellowship is then smoked, and the gifts distributed, and there the matter ends in harmony and fellowship . . . .

Harring, *supra* note 74, at 205 (quoting BLACK HILLS DAILY TIMES (Sept. 16, 1881)).

and the significant doubts as to whether the killing had occurred in self-defense or in cold blood,[79] the case presented the Bureau of Indian Affairs (BIA) and the Justice Department the pretext they sought for extension of federal criminal law to Indians.[80] Crow Dog was arrested and sent for trial in the Territorial Court of South Dakota, where he was sentenced to hang by an all-white, anti-Indian jury.[81]

However, the U.S. Supreme Court reversed the conviction. The Court found the Brule to be entitled to self-determination, at least to the extent of the preeminent right to exercise their own methods, without U.S. interference,[82] to resolve disputes wholly internal to the tribe:

> The pledge to secure these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.[83]

Lest its finding be misconstrued, the Court elaborated upon its defense of the sovereign right of Indian tribes to employ traditional Indian dispute resolution in tribal matters, holding that it would be unjust in the case at bar to extend U.S. law:

> Over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the

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79. *See* Harring, *supra* note 74, at 199.

80. *See* Harring, *supra* note 74, at 200-01. According to Harring, evidence indicates that briefs and legal theories suggesting the extension of federal criminal law to crimes committed by Indians against Indians had been developed in advance, and the U.S. Attorney General was simply waiting for a fortuitous test case. *See* Harring, *supra* note 74, at 200-01.

81. *See* Harring, *supra* note 74, at 204-12.

82. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 236 (1982) (citing *Ex parte* Crow Dog, 109 U.S. 556, 568 (1883)).

83. *Crow Dog*, 109 U.S. at 567-68.

> conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the custom of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[84]

Despite this pronouncement, and notwithstanding the restoration of Brule tribal harmony, for the white majority, *Crow Dog* constituted a "legal atrocity," because an Indian killer had "escaped punishment."[85] U.S. Representative Cutcheon of Michigan pronounced this sentiment before the Indian Affairs Committee in presenting a bill in 1884:

> I believe we all feel that an Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for the law, and show them that they are not only responsible to the law but amenable to its penalties.
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> . . . .
>
> It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the "blood avenger"—that is, the next of kin of the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him.[86]

Determined to rectify the barbarous, "savage quality" of tribal law and mollify public fervor, Congress applied "white man's morality" to extend federal criminal jurisdiction and make murder of an Indian by an Indian a federal crime punishable in federal court.[87] This was accomplished through the Major Crimes Act of 1885,[88] which expressly

84. *Id.* at 571.
85. Harring, *supra* note 74, at 191, 194.
86. 16 CONG. REC. 934 (1885).
87. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 36-38 (3d ed. 1991).
88. Major Crimes Act of 1885, ch. 341, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (1994) and expanded to 14 felonies from the original seven).

reconfigured the legal basis for recognition of tribal sovereignty by providing for concurrent federal jurisdiction over major felonies committed by Indians on reservations regardless of the status of their victims.[89]

Although legal challenges to the Major Crimes Act were swift in coming, the political climate for the erosion of the last vestiges of tribal sovereignty was too friendly for the Court to ignore. In *United States v. Kagama*,[90] an Indian man challenged the constitutionality of the Major Crimes Act claiming that his murdering of another Indian on a reservation was a matter not for U.S. but for tribal jurisdiction. The Court ruled that Congress had an "incontrovertible right" under the judicially discovered doctrine of "plenary power" to exercise its authority over Indians as it saw fit, for their own "well-being." The Court stated Congress and the tribes were in a guardian-ward relationship and Indians were dependent on the United States for their political rights and thus were without legal recourse.[91]

In the wake of *Kagama*, the three branches of federal government conspired to develop the plenary power doctrine.[92] They also crafted a broad assimilationist policy to include the passage of over five thousand laws regulating Indian tribes[93] and ultimately weakened "traditional relationships, involving marriage, family and clan relationships, the distribution of property, and social and political organization."[94]

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89. The Major Crimes Act states in pertinent part the following:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [rape and related offenses], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, . . . an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153.

90. 118 U.S. 375 (1886).

91. *See* United States v. Kagama, 118 U.S. 375, 381-82, 384 (1886).

92. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 219-22 (1984) (describing interbranch cooperation in domesticating Indian law).

93. *See* Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 19 n.26 (1998).

94. Harring, *supra* note 74, at 194.

F. INSTITUTIONAL CAPITULATION: COURTS, CONSTITUTIONS, CODES, CRIMINAL "JUSTICE"

Capitalizing further upon the judicially sanctioned erosion of tribal culture and sovereignty, Congress, in the 1890s, delegated power to the BIA to develop Courts of Indian Offenses (CIO). These courts were empowered to enforce stringent social control mechanisms with the purpose of extinguishing tribal legal systems and to force assimilation by punishing traditional modes of behavior and expression that were in contrast to Western culture. In arguing before Congress for the eradication of the practices of Indian religion, dancing, and feasting, Secretary of the Interior Henry M. Teller proclaimed that:

> If it is the purpose of the Government to civilize the Indians, they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them . . . Every man familiar with Indian life will bear witness to the pernicious influence of these savage rites and heathenish customs.[95]

By 1892 the BIA Commissioner had listed the following offenses as within the jurisdiction of the Courts of Indian Offenses: "participating in dances or feasts, entering into plural . . . marriages, acting as medicine men [i.e., practicing Indian religion], destroying property of other Indians, engaging in immorality, [and] intoxication."[96] By 1900 CIO/CFR Courts, as they were commonly called, had been created on the majority of reservations.[97] Judges were chosen from the ranks of the more "assimilated" Indians who were willing to cut their hair, wear western attire, and accept individual land allotments carved from the tribal land mass[98] under the Dawes Act.[99]

With federal jurisdiction having replaced tribal legal systems and Indian culture effectively criminalized, the next logical step was to impose the Anglo-European adversarial legal system in the stead of traditional Indian restorative legal systems. Congress accomplished this in 1934 with the Indian Reorganization Act (IRA).[100] Although the IRA expressly recognized that tribes might create their own courts and enact

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95. Newton, *supra* note 29, at 1033.
96. Newton, *supra* note 29, at 1033.
97. *See* Newton, *supra* note 29, at 1034.
98. *See* Seielstad, *supra* note 8, at 139 n.28.
99. *See* General Allotment Act of 1887 (Dawes Act) ch. 119, 24 Stat. 388.
100. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

their own laws,[101] the new legislation required tribes to accept boilerplate constitutions. This boilerplate language forced the "fragmentation and compartmentalization of [what remained essentially 'Indian' in] tribal affairs into a sort of constitutional 'box,' leaving behind a vast array of social, political, and spiritual elements traditionally associated with indigenous governance." Although the tenor of the IRA and subsequent federal policies appeared to suggest an attempt to encourage tribal self-determination in the administration of the tribal judicial process, the tribal courts created under the IRA were nothing more than revamped CIO/CFR Courts. These newly created courts followed the federal pattern even more closely, with American substantive law governing the judicial process[102] and bearing a regime of individual rights drawn almost exclusively from an atomistic strain of Anglo-American jurisprudence and largely hostile to the communal notions of justice inherent in traditional Indian legal systems.

Moreover, after the passage of Public Law 280 in 1954,[103] providing that any state could unilaterally elect to accept jurisdiction over the Indian territory located within its borders and establish a system of concurrent jurisdiction, the entire body of state civil and criminal law was extended to cases involving Indians. Out of fear that failure to create acceptable tribal courts would result in states assuming jurisdiction over *all* cases occurring on reservations,[104] and out of the understanding that review of Congressional exercises of regulatory jurisdiction over Indian affairs was an exercise in futility,[105] the tribes, one after another, begrudgingly acceded to federal and state policies of forced assimilation and implemented constitutions, tribal courts, and adversarial-based justice systems.[106]

The penultimate blow to Indian legal systems and traditional modes of dispute resolution fell in 1968 with the Indian Civil Rights Act,[107]

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101. *See* 25 C.F.R. § 11.100(c) (1997).

102. Porter, *supra* note 21, at 269-70.

103. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) & 28 U.S.C. § 1360 (1994)).

104. *See* Costello, *supra* note 5, at 896 (stating that the Navajo Tribal Courts were created to prevent state court jurisdiction over the Navajo nation).

105. *See* Nader & Ou, *supra* note 93, at 19 n.26.

106. *See* COHEN, *supra* note 82, at 332-35 (providing a detailed account of the role of the United States in the development of tribal courts).

107. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (1994)). The ICRA provides that No Indian tribe in exercising powers of self-government shall, among other things:

1. violate freedom from unreasonable search and seizures, or issue warrants without probable cause;
2. subject any person to prosecution more than once for the same offense;
3. compel any person to testify against himself in a criminal case;
4. deny the rights to a speedy and public trial, to be informed of the charges, to confront

which imposed many of the individualist strictures of the U.S. Constitution, and in particular the Bill of Rights, on tribal governments,[108] and further circumscribed the jurisdiction and autonomy of tribal courts to smooth the way for what many Indian activists branded "white-man's justice."[109] The ICRA was propounded by its sponsors as an instrument designed to aid the tribes in establishing "meaningful self-determination" consistent with national policy.[110] From the Indian perspective, the formal jury system[111] was foreign to traditional methods of Indian dispute resolution. Ancient and sacred tribal traditions of fairness and justice also made the ICRA and its reference to "due process," "equal protection," "speedy trial," and "freedom of speech" an unnecessary and unwelcome intrusion on tribal sovereignty.[112]

Consistent with the interests of promoting Indian self-determination Congress left interpretation of the ICRA within the authority of the tribes and offered the admonition that the purpose of the statute was to protect individual rights as against the administration of tribal justice without eroding the parameters of tribal sovereignty.[113] Also, the ICRA did not provide a remedy in federal court for a tribal member contesting the legality of his detention by a tribal court, except for a writ of habeas corpus.[114] As Porter noted, the ICRA "significantly altered the

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witnesses, to subpoena witnesses, and at one's own expense to be assisted by an attorney in all criminal cases;

5. require excessive bail, excessive fines, inflict cruel and unusual punishment, or impose punishment greater than imprisonment for one year and a fine of $5,000 or both for conviction of any one offense;
6. deny equal protection of the laws or deprive any person of liberty or property without due process of law;
7. pass any bill of attainder or ex post facto law; and deny the right, if accused of an offense punishable by imprisonment, to a trial by jury of not less than six persons.

See 25 U.S.C. § 1302 (1994).

108. *See* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557 (1972).

109. *See* Porter, *supra* note 21, at 271-72.

110. *See* Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 449 (1992).

111. *See, e.g.*, Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) (holding, that with respect to criminal law, the ICRA required "a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and . . . no showing of prejudice in the tribal court or in the system of governing laws").

112. Although they embody sets of core Indian cultural values in addition to those structurally embedded by their federal drafters, the very notion of written tribal constitutions is an imposition upon tribal sovereignty by a foreign power. *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 494-95 (1998).

113. *See* Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115 (1998) (suggesting that the legislative history indicates Congress intended the ICRA to be a compromise statute that would extend American constitutional norms to tribes while preventing those norms from significantly disrupting tribal culture, particularly as the consequence of persistent external judicial influence and particularly after the amendments in 25 U.S.C. §§ 1301-1303). Nevertheless, it is debatable whether the judiciary has faithfully discharged Congressional intent as per the ICRA.

114. "The privilege of the writ of habeas corpus shall be available to any person, in a court of

focus . . . away from the tribal community towards the individual . . . under the guise of strengthening tribal governance."[115]

By the early 1970s, the centuries-long U.S. assault on tribal legal systems and the Indian culture in which they were so deeply rooted, had disrupted and almost entirely displaced traditional methods of social control in favor of the tribal courts.[116] Reliance upon the selfish individualist Anglo-American adversarial legal system as the more "civilized" approach to dispute resolution almost entirely displaced pre-Columbian tribal legal and cultural norms of nonconfrontationalism and harmony restoration and acquired tenure in Indian country. BIA-drafted tribal codes permitted tribal court judges to apply tribal statutes. But, federal and state laws were supreme,[117] even where they were clearly unsuitable for the tribal context or where they did not resonate with tribal values. Federal judicial review steered tribal court jurisprudence into lockstep conformity with the U.S. legal system.[118] Unsurprisingly, individual reliance on foreign legal concepts and foreign legal advocacy removed Indian disputes from their natural contexts[119] and soon produced increased and unresolvable acrimony in reservation communities now shorn of more flexible systems of community dispute resolution.[120] With tribal courts and tribal governments increasingly revealed as little more than illegitimate and unjust appendages serving the interests of the American hegemon, enforcement of judgments became

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the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (1994). Nevertheless, there is little litigation in federal or tribal courts concerning issues of excessive punishment; according to Robert McCarthy, it is possible that only "orders of permanent banishment from the reservation may constitute restraints on liberty sufficiently severe to satisfy the jurisdictional prerequisites for the ICRA's habeas corpus relief in federal court." McCarthy, *supra* note 112, at 474.

115. Porter, *supra* note 21, at 272.

116. *See* Newton, *supra* note 29, at 1037; *see also* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (establishing the thesis that U.S. courts are "jurispathic" in that they destroy law generated by interpretative communities such as Indian tribal courts, which are "jurisgenerative").

117. *See* Freshman, *supra* note 1, at 1751 (noting that federal regulations and tribal statutes require tribal courts to "look first to potentially applicable federal law of the United States before seeking to apply tribal law").

118. *See* Newton, *supra* note 29, at 1038.

119. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 526 (1980-81) (constructing the notion of "natural contexts" for particular types of disputes); *see also* Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327, 335 (1993) (emphasizing that in many tribal courts individual criminal acts are punished without any effort made to undertake communal restoration).

120. *See* Haberfeld & Townsend, *supra* note 53, at 409 (noting that by the 1970s Indian tribes were split into contending camps of traditionalists, who opposed violating the sanctity of tribal lands through extractive commercial development, and hypercompetitive modernists, who supported exploiting collective tribal resources for commercial development and personal advancement in terms of jobs, income, status, and power); *see also* Zuni Cruz, *supra* note 18, at 596 (describing how the adversarial system employed by tribal courts, by placing a high value on protecting the individual from the excesses of the collective, compounded these tribal rifts to the benefit of a handful of self-centered elites and to the detriment of the traditional mutually beneficial relationship between the individual and the tribe).

far more difficult than under the *ancien regime,*[121] which furthered the detriment of harmonious communal social organization.[122] Although the process of colonization had nearly been completed, a new generation of critical legal jurisprudence influenced by the Civil Rights Movement began to question the foundations and institutions of federal Indian law,[123] thereby beginning the long and daunting task of reclaiming Indian sovereignty by recapturing tribal legal autonomy.[124]

III. BACK TO THE FUTURE: INDIAN TRIBAL PEACEMAKING AS APPROPRIATE DISPUTE RESOLUTION

A. TRIBAL COURTS LAUNCH THE RESISTANCE

The climate for ventures geared toward reclaiming Indian sovereignty by recapturing tribal legal autonomy was not hospitable, despite the official U.S. proclamation of the Era of Indian Self-Determination. In 1970, public opinion and federal policies remained ambivalent at best, regarding the exercise of Indian rights. The Rehnquist Court further restricted tribal court jurisdiction—already limited to civil and minor criminal matters occurring on the reservation provided the state did not elect to exercise its concurrent jurisdiction[125]—to consenting tribal members on those parcels of the reservation central to tribal governance. The Court also called into question the very rationality and legitimacy, not only of the link between Indian territory and sovereignty,[126] but of the capacity of traditional Indian legal systems and tribal courts to exercise independent, sound judgment.[127] Nevertheless, despite the

121. *See* Newton, *supra* note 29, at 1036-37.

122. *See* Porter, *supra* note 21, at 277-81 (arguing that the adoption of litigation as the sole or primary means of resolving interpersonal conflict pushed individual tribal members to focus exclusively on the vindication of their individual rights, thereby marginalizing their relationships to each other and their tribes). By the 1970s, indigenous people were frequently subject to the coercive sanctions of externally-imposed methods and institutions of justice, a fact reflected most alarmingly in increased rates of incarceration and other coercive contacts with the criminal justice system.

123. *See* Newton, *supra* note 29, at 1036.

124. *See* Seielstad, *supra* note 8, at 139 (positing that legal assimilation, a precursor to more general assimilation, could potentially herald the extinction of Indian tribal societies).

125. States may elect to exercise their concurrent jurisdiction despite the pendency or conclusion of a tribal court proceeding and thus subject Indian defendants to twice the chance of conviction and half the chance of escaping punishment without violating either the Double Jeopardy Clause of the U.S. Constitution, state constitutions, or the common law doctrine of *res judicata. See* 18 U.S.C. § 1162 (1994) (giving states concurrent jurisdiction over criminal offenses committed by or against Indians); *see also* 28 U.S.C. § 1360 (1994) (giving states concurrent jurisdiction in civil actions where Indians are parties).

126. *See* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4 (1993) (noting that Indian territorial sovereignty, as with the sovereignty of other peoples, has traditionally been considered to connote the authority of a recognized government over a geographical region and the people living within it).

127. In 1981, the Court held that non-Indian hunters and fishermen on non-Indian fee land, even

radically diminished territorial conception of tribal judicial sovereignty, traditional mechanisms for keeping the peace still existed along with established centers of authority despite the best efforts of the federal and state governments.

By the mid-1970s, several tribal courts were quietly rebuilding their institutional legitimacy by rediscovering and applying tribal customary law.[128] Some tribes, such as the Navajo, were openly according "custom and tradition the highest priority in [the] choice of substantive law."[129] Also, a number of tribal codes were making explicit provisions for informal dispute resolution processes "aimed at working out the dispute in the Indian way."[130]

B. ALLIES IN ADR: MAJORITARIAN CRITICS OF THE ADVERSARIAL SYSTEM

The renaissance of tribal legal systems gathered steam in the late 1970s when an emerging body of scholarly work[131] bolstered the Indian perception that the adversarial model of justice was ill-tailored to the resolution of many types of disputes.[132] The field of Alternative Dispute Resolution (ADR) promised "to release us from some—if not all—of the limitations and rigidities of law and formal legal institutions . . . ."[133] Despite its reformative contributions, standard modes of ADR, such as arbitration and mediation,[134] were inappropriate to the resolution of Indian intratribal disputes, and to the resurrection of traditional Indian legal systems. Moreover, rather than force upon tribal societies "alternative dispute resolution" techniques borrowed from a culturally neutral

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within boundaries of a reservation, do not enter any agreements or dealings with the Indian tribes so as to subject themselves to tribal civil jurisdiction, thereby extending the exclusion of tribal sovereignty over non-Indians on reservation land from criminal to civil subject matter, on the ground that such non-Indian hunting and fishing did not so threaten tribal political or economic security as to justify tribal regulation. *See* Montana v. United States, 450 U.S. 544, 566 (1981). In 1990 the Court denied tribal court jurisdiction over the crimes of non-member Indians committed on the reservation on the grounds that tribal courts, while they "include many familiar features of the judicial process, . . . are influenced by the unique customs, languages, the usages of the tribes they serve," thereby implying inferiority and incapacity to extend due process to anyone but tribal members. Duro v. Reina, 495 U.S. 676, 693 (1990). The Court went on to hold that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members." *Id.*

128. *See* Newton, *supra* note 29, at 1038; *see also* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 61-79 (1995) (providing background on tribal courts and explaining the importance of contextual legitimacy); VINE DELORIA & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 110-36 (1983) (discussing the evolution of tribal justice systems).

129. Seielstad, *supra* note 8, at 140.

130. Newton, *supra* note 29, at 1048 n.175.

131. *See* Haberfeld & Townsend, *supra* note 53 (summarizing early criticism of the adversarial justice paradigm as applied to the resolution of Indian disputes).

132. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366-67.

133. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U.L. REV. 1, 1 (1991).

134. *See* Costello, *supra* note 5, at 899.

non-Indian context, legal reformers suggested that contemporary Indian dispute resolution methods should be rediscovered and tailored to the more multi-faceted cultural processes and complex social arrangements that characterize each distinct reservation setting.[135] As Zion and Yazzie contended, "traditional justice is not 'alternative dispute resolution,' but [our] original dispute resolution [which] . . . continue[s] to be a viable method of law and justice . . . [and] a legitimate means of self-governance."[136]

C. TRIBAL PEACEMAKING: THE INDIAN LEGAL MANIFESTO

1. *Contemporary Origins*

Thus, although ADR theorists and practitioners could not displace a framework of justice precluding culturally and substantively appropriate solutions to Indian intratribal disputes, the advent of ADR invigorated Indian legal activists. The "Tribal Peacemaking" (TPM) concept was defined by Bernard as "any system of dispute resolution used within a Native American community which utilizes non-adversarial strategies . . . [and] incorporates some traditional or customary approaches . . . the aim of which is conciliation and the restoration of peace and harmony."[137] TMP reawakened the spirit of traditional Indian dispute resolution at the 1985 First Tribal Peacemaking Conference in Seattle.[138] Presently, after more than a decade of theoretical revision and refinement in

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135. *See* Menkel-Meadow, *supra* note 133, at 6.

136. Zion & Yazzie, *supra* note 43, at 55-56. By the early 1980s concern for the potential of race-, gender-, and ethnic-based societal discrimination to intrude into informal dispute resolution processes triggered empirical analysis. Two scholars demonstrated that individuals and groups with lesser social power, primarily nonwhites and women, fared comparatively more poorly in ADR than their white and male counterparts, and more poorly in ADR than in litigation, despite the expectations of ADR advocates. *See* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 769 (1996); *see also* Jeanne M. Brett et al., *Culture and Joint Gains in Negotiation*, 14 NEGOTIATION J. 61 (1998) (presenting the associative influence of culture as an independent variable in explaining and predicting disparate outcomes for minorities as contrasted with majorities); Grillo, *supra* note 16, at 1549 (questioning whether ADR impinges the political and legal autonomy of disenfranchised minority groups and suggesting that formal adjudication with judicial oversight and interposition may provide safeguards against the exposition of disabling racial and cultural animus); Delgado et al., *supra* note 132, at 1363, 1394 (castigating ADR, for failing to consider unequal distributions of power, enhancing social control by ignoring structured social inequalities themselves productive of disputes, and refusing concentration on the disputes of those who had confronted legal authority or defied legal norms). Indian legal scholar-activists joined in the condemnation of ADR as a "pacification plan to stem the [Indian] rights movement" and steer Indian claims they contended were treated along with domestic conflicts, consumer cases, and civil rights issues as "garbage cases" away from federal courts into medication where could be dealt. Nader & Ou, *supra* note 93, at 27. Meanwhile, for Indian litigants, the solution was not to revisit the adversarial model but to awaken dormant methods of Indian dispute resolution. *See* Zion & Yazzie, *supra* note 43, at 55-56.

137. Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 835 (1996).

138. *See* LeResche, *supra* note 63, at 323.

professional networks and national conferences, TPM, a "rediscovered method of Indian dispute resolution,"[139] has wended its way into hundreds of tribal court systems. TPM carries with it the expectation that, by wedding ancient and abiding Indian values to dispute resolution techniques appropriate to the modern pluralist context in which tribes now are situated,[140] it can better secure community health than have alien methods of dispute resolution.[141]

2. *Theoretical Description*

Rather than mediation with an Indian twist, TPM is the ideal-typic form of horizontal justice.[142] It publicly and ceremonially deploys spiritual, non-legal norms and collected tribal wisdom; invokes the connectedness of all things; listens deeply to the widest possible circle of people; speaks compassionately to their hearts to remind them of their relational and cooperational obligations to be unselfish to one another;[143] and seeks to heal hurts and wounds old and new. At the same time TPM seeks to balance the intellectual, emotional, and physical dimensions of not simply the disputants but the entire tribe which it guides on a journey to restoration.[144] In this restoration, TPM recognizes no separation of the religious and the secular, and supernatural power can be directed to remove or overcome sources of disharmony and reestablish order.[145] For obvious reasons TPM is not typically employed in disputes involving non-Indians and is rarely used in disputes between members of different tribes.[146] Within a single tribe, however, TPM is frequently limited to the

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139. LeResche, *supra* note 63, at 322.

140. *See* Haberfeld & Townsend, *supra* note 53, at 419. It is important to stress yet again that the particular dispute resolution methods employed by any particular Indian tribe are distinct as from every other Indian tribe in that they are the experiential products of the unique culture, history, and wisdom of that tribe as it has evolved over time. Thus, while it is possible to speak in general terms when describing TPM in the theoretical abstract, a mature and enriched understanding of TPM in practice can only be acquired by a tribe-specific inquiry which is sensitive to intertribal difference as well as similarity and which avoids the pitfalls of overgeneralization.

141. *See* Costello, *supra* note 5, at 888 (suggesting that whereas adversarial methods of dispute resolution compromise the spiritual, emotional, mental, and physical health of the Indian community by pitting individuals and groups against each other, tradition—and nonadversarial—methods of dispute resolution are reconstitutive and restorative of communal harmony and thus communal health).

142. *See* Bluehouse & Zion, *supra* note 119, at 336.

143. *See* LeResche, *supra* note 63, at 321.

144. *See* LeResche, *supra* note 63, at 321-22.

145. *See* Bluehouse & Zion, *supra* note 119, at 332.

146. *See* Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in The Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 16 (1993) (noting that where outsiders are involved in disputes with members of Indian tribes, particularly where physical injuries are involved, the absence of the common ties of kinship, religion, community, and ethos that drive the process of Indian dispute resolution and encourage parties to remove the conflict from the adversarial plane in the interests of tribal health and harmony would tend to preclude the success of such an enterprise under such circumstances); *see also* Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REG. U. L. REV. 53, 53 (1998) (noting that while elements of TPM, termed

resolution of domestic disputes.[147] In certain tribal jurisdictions, it is the method used to resolve even criminal offenses as serious as robbery, rape, and even murder.[148]

3. *Parties, Procedures, Process, Remedies*

In more practical terms, TPM reflects the interests of the Indian parties against the backdrop of tribal norms where subtle and not-so-subtle behavior-altering mechanisms—anger, shame,[149] embarrassment, and encouragement—are freely allowed to modify previously-held negotiating positions[150] and guide the parties toward harmony. Neither lawyers nor judges are permitted to be present. All those who know the parties or are familiar with the history of the problem are required to attend and to sit together in a circle.[151]

The procedure, always conducted orally,[152] is supervised by a "peacemaker" who has gained the respect and trust of tribal members by living a long and exemplary life in spiritual and temporal terms.[153] Nevertheless, the "peacemaker" has merely persuasive rather than compulsory powers to guide the disputants. The obligation of the peacemaker does not officially extend further than inducing people to talk to one another by speaking and thinking well and exemplifying tribal values and ways.[154] The peacemaker is not a neutral party: he or she has the respect of the parties, who are frequently related to him or her by

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"restorative justice," have been introduced into non-Indian systems and contexts such as family group conferences, cases involving "community injury," and victim/offender mediation, these efforts have not met with anticipated success, largely because urbanized and atomized settings do not offer the "spiritual glue" or the pull of communal obligations to condition individual conduct). In essence, so central to the successful functioning of TPM is the commitment to shared tribal values and responsibilities the extension of TPM beyond the boundaries of the reservation or beyond the subject matter of disputes between tribal members is inherently problematic; TPM cannot always be expected to succeed in cases where an outsider is involved in a dispute with a tribal member, particularly where a physical injury occurs. This particular scenario, which reveals the potential limitations as well as the future possibilities of TPM, is discussed extensively *infra* in Part IV.

147. *See* Bernard, *supra* note 137, at 833-34.

148. *See* Lieder, *supra* note 146, at 17-18.

149. *See* Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1015 (1997) (describing how, within the tightly interconnected tribe, the technique of shaming—calling down personal criticism upon one who deviates from group norms—can, although it does not force a person to conform, induce those who wish to remain accepted within the tribe to modify their contrarian positions in order to bring themselves into a state of harmony with others).

150. *See* Porter, *supra* note 21, at 253.

151. *See* Bernard, *supra* note 137, at 830.

152. *See* Porter, *supra* note 21, at 253.

153. *See* LeResche, *supra* note 63, at 321 (demonstrating that one of the most important criteria in the selection of "leaders" of traditional Indian tribal societies was skill in mediating intragroup hostility). Research concerning the legal systems of other tribal peoples suggests that selection as leaders of those with skill in dispute resolution may be a common characteristic of this level of sociopolitical organization. *See, e.g.*, Weyrauch & Bell, *supra* note 4, at 352-53 (noting that the main criteria for chiefdom among the Roma is "intelligence and a sense of fairness" in resolving group disputes).

154. *See* Costello, *supra* note 5, at 887.

blood or marriage.[155] Thus, the parties are strongly inclined to follow proffered "guidance."[156] The guidance typically encourages people to live up to their communal responsibilities, requests apologies, suggests means and amounts of restitution,[157] and ensures that all parties depart "with their tails up [rather than with one] with a tail up, one with a tail down."[158]

The peacemaker typically enters the center of the circle to lead a prayer summoning the aid of the supernatural[159] and to frame the attitudes and relationships of the parties. The peacemaker then listens to all interested persons from their subjective points of view[160] in order to determine the reasons for the state of disharmony.[161] In this open, loosely structured discussion, feelings and emotions are recognized as equally important to reason,[162] and all persons, though they are offered emotional support along the way,[163] are required to directly confront the full consequences of their actions, including the injustice done and the

155. *See* Bluehouse & Zion, *supra* note 119, at 329 (explaining that the "core of common law" of most Indian legal systems is the "lineage system," a method of tracing relationships and adjusting disputes between people with the assistance and intervention of clan and family members whose influence with their blood relatives constituted a form of "ingrained emotional cement." Thus, in traditional Indian dispute resolution, as well as contemporary TPM, the peacemaker is often a blood relative of one or both of the immediate parties). Several tribal codes, such as the Navajo Code of Judicial Conduct (1991), explicitly state that peacemakers in TPM may be related to parties by blood or clan. *See* Bluehouse & Zion, *supra* note 119, at 334.

156. *See* Bluehouse & Zion, *supra* note 119, at 332. For the peacemaker in TPM there is an explicit stress upon an affirmative and interventionist role in maneuvering the parties back into harmony by way of reference to traditional values. In the language of mainstream ADR, the TPM peacemaker can be cast as a directive and activist mediator whose expertise in the particular substantive domain in which the dispute occurs permits him to thrust himself forcefully into the conflict and make judicious use of persuasion, influence, and judgments to achieve the concrete settlement of an otherwise elusive problem. Nevertheless, TPM is neither mediation nor arbitration as understood by the Western mind as such terms do not capture the inherently spiritual, communal, and restorative essence of TPM. *See* Bluehouse & Zion, *supra* note 119, at 335.

157. *See* Roback, *supra* note 54, at 35 (noting that TPM almost never offers the guilt of the accused as the "question presented"; rather, the gap separating parties and damaging tribal harmony is generally the amount of restitution, either material or services, to be paid to resolve the dispute, and this amount is the subject of bargaining, negotiation, and intervention by the peacemaker).

158. LeResche, *supra* note 63, at 322.

159. In the horizontal model of dispute resolution employed by many traditional Indian tribal societies every person sitting in the circle would focus upon the center of the circle where the peacemaker would move the dispute from the circumference to the center so that all four quadrants (spiritual, emotional, physical, and intellectual) would reenter a balance and recomprise a united whole. For a description of this process, see Costello, *supra* note 5, at 888.

160. *See* Mark J. Wolff, *Spirituality, Culture and Tradition: An Introduction to the Role of Tribal Courts and Councils in Reclaiming Native American Heritage and Sovereignty*, 7 ST. THOMAS L. REV. 761, 762 (1995) (noting that the subjective, as well as the objective, is within the purview of tribal peacemaking).

161. *See* Bluehouse & Zion, *supra* note 119, at 330.

162. *See* Costello, *supra* note 5, at 898.

163. *See* Zion & Yazzie, *supra* note 43, at 83.

resultant harm.[164] Emphasizing future relations rather than the legal consequences of past events,[165] the peacemaker then (1) presents a lecture on how or why the parties have violated tribal values and breached tribal solidarity,[166] (2) leads a precise discussion of practical means whereby the parties can end the present dispute, and (3) suggests in some detail how all can conform their future conduct to tribal values reflective of their relational aspects as well as of the tribal right to justice and harmony.[167]

4. *"Enforcement"*

TPM is decidedly nonpunitive in its philosophical underpinnings and restorative functions. In contrast to state adjudication, no central authority can directly apply coercion to enforce the will of the collective and restore harmony. Remedies mutually agreed upon in TPM ceremonies are generally implemented without resistance and without resort to the traditional instruments of the penal system, even in cases concerning conduct that would be characterized as criminal in the mainstream justice system for four primary reasons. First, as agreements reached in TPM are the product of a consensus that includes the wrongdoer(s), the personal honor and communal obligation of the wrongdoer(s) are preenlisted in support of compliance.[168] By the same token, TPM enlists extended family and friends as "probation officers" for the wrongdoer and confers upon them a "responsibility to the victims and communities

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164.

> [TPM] addresses denial, minimalization and externalization in ways that [mainstream] systems cannot do. In a given [mainstream] system, proving the facts of a case is difficult and burdensome. In criminal systems with the privilege against self-incrimination, defendants cannot be compelled to discuss motives, attitudes, addictions or causes of misconduct. In [TPM], which does not utilize punishment, people are free to "talk out" the problem fully and get at the psychological barriers which impede a practical solution.

Zion & Yazzie, *supra* note 43, at 81.

165. *See* Costello, *supra* note 5, at 899.

166. *See* Zuni Cruz, *supra* note 18, at 581-82. To Zuni Cruz, breaches of tribal solidarity are generally occasioned by individuals who either place greater emphasis upon their individual needs and desires than they do upon the interests of the tribe or who make personal choices which affect the community in deleterious fashion. *See* Zuni Cruz, *supra* note 18, at 581.

167. *See* Porter, *supra* note 21, at 251-54 (discussing elements of peacemaking). Tribal peacemaking amongst the Roma people, known colloquially as Gypsies, is similar with regard to the central and activist role of the peacemaker in shaping the resolution of intratribal disputes in such a fashion as to affirmatively restore tribal harmony. *See* Weyrauch & Bell, *supra* note 4, at 354-57 (identifying the concepts of horizontalism, egalitarianism, and voluntary deference to peacemakers as representative of communal values and will, supernatural supervision of dispute resolution, and communal restoration as elements of Roma dispute resolution as well).

168. *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11, 40-42 (1984) (delimiting the vast domain of private lawmaking).

to prevent the wrongdoer from causing further harm."[169] Moreover, given the powerful psychological sanctions available to the tribal community in the form of ridicule, ostracism, and banishment, it is not difficult to manipulate the need of a wrongdoer to remain in good stead within the community.[170] Finally, in TPM juvenile wrongdoers are commonly assigned to perform community service for elder members of the tribe, and often these elders transform into role models who help to guide the youths under their stewardship to success while preserving the tribe from fragmentation as would otherwise occur were such youths sent to prison.[171]

5. *Response from Outside Indian Country*

a. The Indian Tribal Justice Act

The development and introduction of TPM in the United States and Canada[172] did not escape the notice of state and federal justice officials.

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169. Costello, *supra* note 5, at 899-900.

170. Research in the nexus between political economics and anthropology suggests that the institution of the tribe performs an essential insurance function by facilitating fundamental survival tasks that can only be performed in teams and that tribal members, in exchange for this insurance, grant their loyalty unreservedly to the tribe. As a product of these mutually advantageous, continuous, and critical intratribal interactions and the ease of observing and transmitting information and norms within the small community, the problem of monitoring to prevent free-riding inherent in team production disappears. In other words, not only does the tribe reduce or eliminate bad-faith incentives to opportunism or cheating, but expulsion, ostracism, and other forms of collective refusal to deal, highly effective sanctions given the importance of individual reputation and face-saving in a small interdependent circle, are far more cost-effective and efficient than formal legal enforcement mechanisms. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 245-47 (1979); *see also* Roback, *supra* note 54, at 11; Posner, *supra* note 32, at 143-44.

Research into the legal system of other tribal communities supports the finding that the psychological pressure is at least as effective in securing compliance with tribal remedies as the formal institutions of state coercion are in enforcing official justice. *See* Weyrauch & Bell, *supra* note 4, at 358-59 (noting that among the Roma, the permanent sentence of *marime* ("impurity" requiring ostracism and even banishment) is considered the equivalent of a death penalty since the permanent outcast, subjected to enforcement of the sentence by the gossip and shunning of the entire Roma community, is frequently driven to suicide); *see also* Posner, *supra* note 32, at 182 n.144 (describing how Amish wrongdoers are required to make public confessions lest they be shunned, a fate which results in the deviant member becoming a complete social pariah with whom no one will eat, speak, or do business).

171. *See* Costello, *supra* note 5, at 893.

172. By 1988, the Canadian government was implementing TPM on a number of reserves (the Canadian term for a reservation) as a parallel aboriginal justice system formally exempt, as culturally appropriate, from the individual rights restrictions of the Canadian Charter of Rights and Freedoms (the analog of the U.S. Constitution), including *inter alia* the right to remain silent and the freedom from unreasonable search and seizure. *See Putting an End to Native Injustice*, TORONTO STAR, Sept. 5, 1991, at A18. Concerned that a disproportional number of indigenous people were being sent to prison environments that discouraged "disclosure, openness, [and] healing" of indigenous offenders, the Canadian judiciary permitted a number of tribes to operate "community sentencing circles" and other methods of TPM and community mediation wherein the interests of tribal communities, victims, offenders, and the Crown are heard and balanced and the concept of justice is understood to require the full participation and healing of victims, offenders, and members of Indian and non-Indian communities alike. *See* Ross G. Green, *Aboriginal Community Sentencing and Mediating: Within and Without the*

With the change in the political winds ushered in by the 1992 elections, the U.S. moved to make self-determination more meaningful in terms of the legal autonomy of the Indian tribes. In 1993, the U.S. Congress, explicitly anticipating that Indian nations would adopt and utilize their own culturally appropriate forms of dispute resolution, enacted the Indian Tribal Justice Act (ITJA)[173] to fund[174] and strengthen traditional tribal legal systems.[175] Moreover, relevant provisions of ITJA explicitly renounced any congressional intention to interfere with the methods in which Indian nations dispense justice.[176] In response, U.S. Attorney General Janet Reno, already a proponent of cross-cultural borrowing generally and TPM specifically,[177] established the Office of Tribal Justice and Tribal Courts Project to support the purposes of ITJA.[178]

b. But Indians Have No Law!

Although the passage of ITJA and the creation of the Office of Tribal Justice and Tribal Courts Project encouraged both Indian and non-Indian advocates of TPM,[179] by the mid-1990s TPM, after nearly a decade in existence, was not bereft of critics. Many neutral observers have offered general criticisms of alternative dispute resolution as a corrupt, commercialized gimmick threatening the integrity of the jury system.[180] While many non-Indians, still laboring under the "Indians

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Circle, 25 MAN. L.J. 77, 77-81 (1997). Although community sentencing circles proved successful in reducing recidivism, reintegrating offenders into their communities, and strengthening tribal communities, critics contended that Canada was establishing a divisive double judicial standard with one set of rules for Indians and one for everyone else that was subject to political influence and violative of individual rights. *See* Craig Turner, *"Native Justice" in Canada; For Many Indians, Experts Say, Prison is No Deterrent to Crime*, L.A. TIMES, May 7, 1996, at A1; *see also* Ruth Walker, *In Canada, Solving Youth Crime the Tribal Way*, CHRISTIAN SCI. MONITOR, Nov. 12, 1998, at B3 (detailing the Canadian experience with juvenile Indian offenders diverted to TPM).

173. Indian Tribal Justice Act (ITJA), 25 U.S.C. §§ 3601-3631 (1994).

174. *See* 25 U.S.C. § 3611(c)(6).

175. *See* 25 U.S.C. § 3602(8).

176. *See* 25 U.S.C. § 3611(d) (requiring that "[n]othing in this chapter shall be deemed or construed to authorize the Office [of Tribal Justice Support] to impose justice standards on Indian tribes"); *see also* 25 U.S.C. § 3631(4) (requiring that "[n]othing in this chapter shall be construed to alter in any way ANY tribal traditional dispute resolution forum").

177. *See* Goldberg, *supra* note 149, at 1006. According to Attorney General Reno,

> crime victims would be better served if state and federal justice systems emulated [TPM]. [The crime] . . . victim does not feel whole until there is some resolution to the bitterness . . . inflicted by the crime. [TPM] heals rather than determining guilt . . . [and] resolve[s] problems instead of processing cases in lengthy adversarial proceedings.

Goldberg, *supra* note 149, at 1006.

178. *See* Costello, *supra* note 5, at 877.

179. *See* Goldberg, *supra* note 149, at 1006. Among others, U.S. Supreme Court Justice Sandra Day O'Connor, frustrated at the inefficiencies inherent in litigation, expressed her expectation that [TPM] "will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model." Goldberg, *supra* note 149, at 1006 n.15.

180. *See* James Reuben, *The Lawyer Turns Peacemaker*, *in* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 320 (1996) (noting that the most hostile critics of ADR condemned what they envisioned as "kangaroo courts [that] deliver a skewed brand of justice that

have no law" myth and still determined to control tribal life through imposed neocolonial legal systems, expressed specific distrust of TPM, a non-punitive method of dispute resolution inaccessible to their Western-encultured psyches.[181]

For this "ADR-as-gimmick" school of naysayers, the traditional Indian cultural context was so eroded through colonization[182] that the tribal values and teachings in traditional languages and religions at the core of TPM "do not carry . . . the cultural resonance that peacemakers presume . . .[, and] clan relationships that would ensure compliance with [TPM] agreements are seriously compromised."[183] The most serious condemnations were issued from Congress, through repeated attempts to further impose the formality and adjudicative cultural bias of the American legal system upon tribal societies by waiving tribal sovereign immunity and permitting federal judicial review of tribal justice "when they act in a totally lawless fashion."[184] U.S. Senator Orrin Hatch excoriated TPM for its "[n]on-public proceedings, [lack of] representation by counsel, [lack of] notification of procedural rights," and employment of remedies incomprehensible to the dominant society, such as banishment, restitution, and flogging.[185] Despite the failure of such

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fails to provide adequate remedies for women and minorities" and "give the powerful a way around the law").

181. *See* Zion & Yazzie, *supra* note 43, at 83-84; *see also* McCarthy, *supra* note 112, at 466-67 (suggesting that mainstream criminal justice is "rough and wild" in the sense that revenge, punishment, and control drives the process, whereas in contrast TPM, even as applied to what would be deemed criminal in mainstream society, is sacred justice designed to heal).

182. Federal assimilative programs which included removal of children from Indian families and forced fragmentation of tribal lands, have impoverished collective tribal knowledge of languages, cultures, religions, and above all traditional patterns of egalitarianism and mutual respect in relational behaviors, including honoring elders and women. As a consequence, in certain tribal communities ravaged by colonialism and paternalism, cultural identification, with the traditional peacemakers who have the responsibility to teach and uphold, may be extremely tenuous, particularly on the part of those most likely to become miscreants—troubled youth who have not had the benefit of proper parental modeling. *See, e.g.*, Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 100 (1999) (demonstrating that although the onus for cultural annihilation lies upon the colonizers, when tribal communities are not as responsible or affirmative in instilling and upholding traditional cultural as they must be if TPM, which depends upon public acceptance and commitment to traditional tribal values, is to effectively displace imposed justice systems, the door is open to external, i.e. non-Indian, criticism).

183. *Id.* at 99. This is a critical point: as a matter of democratic political theory, the legitimacy of TPM, as with any other justice system, depends upon whether participants voluntarily acknowledge, accept, and conform their conduct to its prescriptions and proscriptions. This is particularly so for Indian people given their tradition of rather loosely organized governmental structures the continuity of which required constant popular affirmation. *See* Valencia-Weber, *supra* note 50, at 250.

184. McCarthy, *supra* note 112, at 466.

185. McCarthy, *supra* note 112, at 466. White legislators eager to undercut popular and federal legislative support for TPM referenced the case of a 17-year-old female member of the Warm Springs Indians in Oregon whose involvement in drugs, gang activity, and other antisocial behavior led her distraught mother to appeal to tribal justice authorities for help. *See Tribal Officials Whip Girl, 17, Despite Her Mother's Protests*, N.Y. TIMES, Oct. 30, 1994, at A38. After a TPM ceremony the peacemaker, with the agreement of the girl and her family, elected to employ the well-established traditional whipping ceremony used continuously for centuries by several Northwestern tribes, and the girl was ceremonially whipped while kneeling on a buckskin and surrounded by her extended family and tribal

legislation, the argument that tribal jurisprudence is incapable of producing cognizable fairness and justice was reinforced and accorded the official imprimatur of a significant plurality of the legislative branch.[186]

c. Feminist Criticism

Although its motivations were in all likelihood less the product of opposition to Indian tribal sovereignty and more the inspiration of a pan-feminist agenda, another body of anti-TPM analysis issued forth from non-Indian feminist scholars. While conceding certain benefits of TPM as applied to the resolution of domestic violence cases in Indian communities,[187] these scholars contended that TPM, often implemented without the informed consent, depreciates the focus on the interests of battered Indian women.[188] Remedies obtainable only in formal adjudication[189] are abandoned in favor of a fixation on the restoration of the batterer to the community. The "harmony" of tribes fails to acknowledge their internal sexist practices[190] and treat women's stories of abuse, as anecdotal or even the natural male response to female provocation and further erodes the situation faced by a battered Indian woman.[191] However, despite genuine attempts at evenhandedness and the pro-Indian credentials of many of their authors, as a number of Indian feminist scholars were quick to indicate,[192] the criticisms leveled by non-Indian feminists at TPM struck many of the same chords as did those offered

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elders. *See id.* Not only did the whipping inflict no physical injury, but the incorrigible girl remained abusive and required dispatch to a tribal boarding school for girls in Oklahoma; nevertheless, many non-Indian observers registered their "shock" at the "barbarity" of TPM-authorized ceremonial whipping. *See id.*

186. *See* Valencia-Weber, *supra* note 50, at 239, 247, 254 (contending that issue is reducible to an ideological conflict dominated by the fact that "tribal courts . . . don't have systems the dominate society thinks they ought to have").

187. *See* Coker, *supra* note 182, at 38, 42 (conceding, along with other non-Indian feminists, that TPM can overcome typical obstacles such as denial and silence to restructure tribal power relations, "address both systemic and personal aspects of battering and thus disrupt the familial and social supports for battering," "foster social and personal change through narratives based on gender-egalitarian understandings of male-female relations," and "foster a 'safe connection' that does not treat as pathology women's multiple loyalties, including their commitment to relationships with men who have been abusive"). Coker, among other non-Indian feminists, also hales TPM for providing material and legal services to make Indian woman less dependent on their abusers; providing referrals to social service agencies and to traditional healing ceremonies to increase support networks for battered women; requiring batterers to assume personal responsibility for their conduct, seek drug and alcohol treatment, and disassociate from destructive social circles; and incorporating mandatory arrest and reporting provisions, which extend to the workplace and educational environments and promote safety and well-being of all tribal members. *See* Coker, *supra* note 182, at 50, 105, 124-26, 134-35.

188. *See* Coker, *supra* note 182, at 84 (suggesting that TPM can focus inordinately on the offender and his "healing" in the interests of reciprocity to the point of demanding that the battered give him an apology, which she may not mean).

189. *See* Coker, *supra* note 182, at 103 (contrasting a "separation focus" in formal adjudication with a "stay-married" focus in TPM).

190. *See* Coker, *supra* note 182, at 71.

191. *See* Coker, *supra* note 182, at 93-94.

192. *See supra* note 34 and accompanying text.

by the architects and custodians of the imposed legal system still smothering Indian culture and sovereignty.

d. The Balkanization Argument

A final criticism centered upon the notion that following the example of TPM any group, no matter how dubiously constituted,[193] could now claim the rights to be governed by its own customs "dressed up as law" and to demand recognition and enforcement of that "law" in state and federal courts to the detriment of the union.[194] However, proponents of TPM noted the special political status of Indian tribes and drew attention to the fact that by the mid-1990s the destructive results of two centuries of colonialist politico-economic subordination,[195] coupled

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193. Indian tribes are not merely ethnic or religious communities but are also unique and distinct in their political and legal relationship to the state and federal governments. "The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence [and is] marked by peculiar and cardinal distinctions which exist no where else." Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

> The federal-tribal relationship is premised upon broad but not unlimited federal constitutional power over Indian affairs, often described as "plenary." The relationship is also distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. The inherent tension between broad federal authority and special federal trust obligations has produced a unique body of law.

COHEN, *supra* note 82, at 207. Thus, although Indian tribes can legitimately claim both a natural law and Constitutional basis for distinct treatment as (quasi) sovereigns and an entitlement under international and domestic law to make and enforce their own law at least over tribal members on reservation lands and to argue for the recognition and enforcement of such judgments in U.S. and state courts provided such judgments do not offend public policy, the same political status and legal entitlement cannot be claimed for example, members of other minority racial or ethnic groups, religious groups, civil associations, etc. *See infra* notes 199-200 and accompanying text. This, however, does not mean to suggest that there cannot be other bases for the public recognition and enforcement of the private laws of other entities (e.g., the Roma, Orthodox Jewish, universities, etc.).

194. *See* Reisman, *supra* note 10, at 412. Positivists, with Reisman foremost among them, are disturbed by the potentiality of the balkanization of American public law and its displacement by an ethnic legal checkerboard less capable of protecting individual rights and more prone to political contestation. In his words:

> Where there are many groups coexisting in a territory, each may have its own unique vision of past and future, its own language or dialect, its own values, and its own mysterious law, emerging, as group members are encouraged to believe, as a sort of excrescence of the group experience. Superordinating the law of any one group over the others is a prescription for endless conflict. Redefining law in secular and entirely ahistorical terms, as authoritative policy clarification and implementation by the state apparatus, certainly has intellectual limits. Nevertheless, it permits the law to take on a constructive mediating role between the different groups that constitute the community. . . . [This] [P]ositivis[t] . . . ideology [of] contemporary America . . . promises some protection for all groups . . . .

Reisman, *supra* note 10, at 412-13.

195. Thirty-five years after the Civil Rights Movement, Indian reservations remain an internal exile system of concentrated, tenacious poverty and restricted access to education, health care, and markets. The Indian unemployment rate is 45%, now 37% times the national average, and 31% of Indians live below the poverty line. *See* Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 230 (1996).

with the cultural assault upon traditional legal systems, were manifesting themselves in a violent crime wave sweeping out of the inner cities and devastating Indian Country. Relying on patterns of increased gang-related activities,[196] along with statistics that Indians were more than twice as likely as other Americans to become murder victims and thirty-eight percent more likely to be incarcerated,[197] TPM advocates insisted that restoring the fabric of traditional tribal culture was the only effective solution to the problems of reservation crime and the destruction of their youth.[198] Thus, many Indian tribes are bent to refining and developing TPM as the appropriate method for resolving disputes between tribal members on tribal lands in an increasingly desperate effort to reclaim their cultural autonomy and salvage a better future for their wayward youth. Cross-boundary enforcement of TPM outcomes, whether on the basis of full-faith-and-credit[199] or comity[200] were simply not at issue.[201]

These statistics and negative social indicators derivative from the material process of forced dependency and underdevelopment, such as life expectancy, infant mortality, generational poverty, substance abuse, and suicide rates, are markedly worse for Indians than for every other American sub-population. *See generally id.* Even now, most Indian reservations remain vast expanses of joblessness and hopelessness, with Indians the most disadvantaged minority group in the U.S. For a thorough account of the statistical indicators of Indian politico-economc dependency and their contributions to Indian social pathology, see Steven J. Prince, The Political Economy of Articulation: Federal Policy and the Native American/Euroamerican Modes of Production (1993) (unpublished Ph.D. dissertation, University of Utah) (on file with the University of Utah Library). Also see ROBERT N. WELLS, JR., NATIVE AMERICAN RESURGENCE AND RENEWAL (1994).

196. A U.S. Department of Justice study found that in 70% of violent episodes against Indians the offender was a non-Indian. *See* Philip Brasher, *Indians Victimized by Violence*, BOSTON GLOBE, Feb. 15, 1999, at 53.

197. *See id.*

198. Tribal elders, speaking amongst themselves of a "lost generation," warned that the proliferation of drugs, gangs, homicides, and sex abuse was the direct result of the erosion of traditional languages, religions, and cultures, and in particular of a loss of respect for elders. As the mother of the first Navajo juvenile sentenced as an adult in gang-related homicide lamented:

> Navajos are supposed to be real close, but that way of life is dying away. I was raised to get up at 4 a.m., greet the sun and then toss corn pollen in the four directions for wisdom and strength. I tried to get my son to do that and it was chaos, He'd yell, "Leave me alone!" We parents failed these kids because we all came from dysfunctional families.

Louis Sahagun, L.A. TIMES, Nov. 9, 1997, at A18.

199. The Full Faith and Credit Clause in Article IV, Section 1 of the U.S. Constitution is implemented by 28 U.S.C. § 1738 which requires that judgments "of any court of [a] State, Territory or Possession" be enforced by the receiving jurisdiction as res judicata, thereby solidifying the political unity of the states through reciprocal legal obligations. However, Indian tribal courts are not mentioned in 28 U.S.C. § 1738, and with few exceptions federal courts have held that an Indian tribe cannot be defined as a "State, Territory or Possession." *See* Desjarlait v. Desjarlait, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (holding that full faith and credit do not require recognition of tribal custom as the foundation for the decision of a tribal court). Although in specific subject areas, such as the Indian Child Welfare Act, Congress has required that state courts recognize and enforce tribal court judgments, and although tribal court money judgments can be recognized and enforced in state courts after transformation into state judgments under the Uniform Enforcement of Foreign Judgments Act, § 2, 13 U.L.A. 152 (1986), barring Congressional or state legislative intent to extend full faith and credit to particular classes of disputes the judgments emanating from tribal legal proceedings are not entitled to enforcement in any other jurisdictions. For a general discussion of full faith and credit as applied to the Indian context, see Valencia-Weber, *supra* note 50, at 243.

200. *See* Laurence, *supra* note 113, at 130 (noting that the majority pattern is nonrecognition and nonenforcement of tribal court decisions in state courts even where the tribal court had subject matter

However, despite the clear substantive boundaries circumscribing its applications and thereby enhancing its potential to develop traditional Indian legal systems and aid in the reclamation of Indian culture and sovereignty, TPM, already caught in the teeth of criticism emanating from disparate quarters, was drawn into the worst possible scenario: a controversial criminal case[202] in which two Indian youths were charged in the court of a state politically hostile to Indian rights with a serious off-reservation physical attack upon a non-Indian.

IV. THE GREAT EXPERIMENT: THE CASE OF THE TLINGIT PIZZA BANDITS

A. THE BRUTAL CRIME: SORRY WASN'T ENOUGH

Like so many other tribes in the late 1980s, the Tlingit[203] Indians of the Yukon region of southeastern Alaska[204] began employing TPM as part of a larger tribal effort to reestablish traditional tribal values among their youth. In one of its earliest applications, Tlingit TPM[205] was used in the case of an adult Tlingit, an admitted pedophile who, while very intoxicated, molested a Tlingit girl on the reservation.[206] A Tlingit

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and personal jurisdiction over the defendant and comity would suggest enforcement). The broad consistency between the foreign judgment and local public policy which is generally presumed in the case of sister states or nations is not presumed in the case of Indian tribes on the specious theory that, despite the restructuring of Indian tribal courts to resemble American courts under the IRA and ICRA, Indian cultural differences manifest themselves in tribal court customs, procedures, and decisions the enforcement of which in state courts would "shock the conscience." *See* Laurence, *supra* note 113, at 126-27. In all likelihood, TPM, a form of dispute resolution even less homologous to Western-style adjudication, is even less likely to inspire judicial comity.

201. *See* Laurence, *supra* note 113, at 147 (explaining that as coercion is explicitly prohibited in TPM, the purpose of which is to reach a consensus which restores the tribe to harmony, resolutions of TPM "courts" are never entitled to coercive enforcement, whether on or off the reservation). *But see* Weyrauch & Bell, *supra* note 4, at 357 (noting that in California the Roma, an insular community whose legal system is analogous in many respects to TPM, have referred nonbinding recommendations to California courts, principally to remove the "forum shopping" incentive whereby Roma dissenters had been appealing to the American legal system for results different from what they expected in the Roma courts). It is not inconceivable that Indian tribes might pursue a strategy similar to the Roma should TPM prove less able to restore tribal harmony than its advocates expect.

202. *See* Rosenn, *supra* note 22, at 248 (stressing that in any discussion of traditional Indian legal systems by non-Indians, complex subissues such as religion, politics, and community rights surge to the fore, and that different cultural approaches to criminal punishment will tend to draw fundamental values into irreconcilable conflict more frequently than any other legal subject matter).

203. The English-language approximation of the pronunciation of Tlingit is "CLINK-ut." *See Experiment in Tribal Justice: 2 Youth Are Banished*, N.Y. TIMES, Sept. 3, 1994, § 1, at 6.

204. Most of the 2,000 member Tlingit Nation, an indigenous community formally associated with the Haida Indians and governed by the federally-recognized Tlingit-Haida Central Council, most live on coastal reservation islands in the Alexander Archipelago in the Gulf of Alaska in the southeastern corner of that state; nearly 1,000 Tlingit of the dominant clan live in Klawock, headquarters of the Central Council, on Prince of Wales Island. *See* Timothy Egan, *Indian Boys' Exile Turns Out to be a Hoax*, N.Y. TIMES, Aug. 31, 1994, at A12.

205. This system of dispute resolution closely mirrored the standard model described in *supra* Part II.

206. *See* Sherryl Yeager, *Yukon Clan Use Tribal Justice to Fight Crime*, TORONTO STAR, Apr. 19, 1992, at B4.

peacemaker restored tribal members to harmony by inducing the wrongdoer to make a public ceremonial apology, solemnly promise never to repeat the offense, receive alcohol treatment, cease drinking permanently, and accept a month of house arrest followed by three years' probation, the violation of which would result in his imprisonment.[207] By 1992, after a half-decade of employing TPM as a substitute for tribal court adjudication, the Tlingit were enjoying a thirty-five percent decrease in crime,[208] and other tribal, state, and federal governments were looking to Tlingit TPM as a model worthy of emulation.[209] However, in August 1993, while visiting family near Seattle, Washington, seventeen year-olds Adrian J. Guthrie and Simon P. Roberts,[210] Tlingits and cousins, initiated a series of events which damaged the non-Indian perception of TPM and complicated the task of reclaiming tribal sovereignty through law.

On the fateful afternoon, Guthrie and Roberts, after telephoning for a pizza delivery and requesting that the driver bring change for a $50 bill, laid in wait for the driver, Tim Whittlesey.[211] Upon Whittlesey's arrival Guthrie and Roberts attacked him from behind with a baseball bat, fracturing his skull in multiple places and leaving him deaf and partially blind.[212] District Attorneys Michael Magee and Seth Fine promptly charged Guthrie and Roberts as adults with first-degree armed robbery and assault with a deadly weapon. Under Washington law, these charges carried sentences of three to five and one-half years in prison upon conviction.[213]

B. HERE'S YOUR BIG CHANCE: GIVING TPM AN AUDITION

In May 1994, however, after nearly ten months in Snohomish County Jail awaiting trial, Tlingit tribal officials, and in particular Tlingit elder Rudy James, secured a form of plea bargain unique in American

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207. *See id.*

208. *See id.*

209. The ITJA was enacted in retrospect as an acknowledgment not only of the success of TPM within the Indian communities it had been serving but also of the potential contributions TPM might make as a "donor" for legal transplantation to the state and federal criminal justice systems. *See supra* note 176.

210. Guthrie and Roberts, recipients of a mixed traditional-modern upbringing, had not had extensive prior contact with law enforcement authorities. *See* Thomas W. Haines, *"Sorry Isn't Enough"—Contrite Kids Welcome Tribal Judgment*, SEATTLE TIMES, July 16, 1994, at A1.

211. *See* John Balzar, *Two Alaskan Indian Youth Banished to Island for Robbery*, L.A. TIMES, July 15, 1994, at A3.

212. *See id.* Whittlesey, a young married man, was so seriously injured his life was initially in jeopardy, and even upon recovery he was no longer able to achieve his dream of attending medical school. *See id.*

213. *See id.*

history.[214] In exchange for a guilty plea in Snohomish Superior Court, Judge James Allendoerfer, though unfamiliar with any precedent,[215] agreed to accept a $25,000 bond and release Guthrie and Roberts to the custody of James and the Kuye'di Kuiu Kwaan Tribal Court (Tlingit TPM court). The release was conditioned on the requirements that the Tlingit TPM Court would impose their suggested sentence of a year-long banishment to make Guthrie and Roberts ruminate on their crime, purify their spirits,[216] and make restitution to Whittlesey.[217] All parties agreed that Judge Allendoerfer would retain jurisdiction and that Guthrie and Roberts would be haled before him after eighteen months to determine whether the case should be closed or additional punishment should be imposed.[218]

District Attorneys Magee and Fine opposed the precedent this decision[219] would purportedly establish on the grounds that allowing TPM to displace adjudication in Snohomish Superior Court would open the floodgates to "all sorts of cultural exceptions and challenges to state law . . . based on someone's cultural background."[220] Other critics condemned banishment as a cruel and unusual punishment in violation of

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214. *See Experiment in Tribal Justice; 2 Youths Are Banished*, N.Y. TIMES, Sept. 3, 1994, § 1, at 6.

215. *See id.* In fact, in the post-Crow Dog era no state court had ever previously referred a criminal case over which it had original jurisdiction and which arose off-reservation to an Indian tribal court. *See id.*

216. *See* Haines, *supra* note 210. As James explained the Tlingit concept of banishment, "We put them in nature that's absolutely pure so their thoughts and attitudes can be affected by nature and nature's god. By beholding (nature) you become changed." Haines, *supra* note 210.

217. The banishment proposed by the James-constituted Tlingit TPM Court in order to secure the plea bargain included the provisions that Guthrie and Roberts would be confined to separate tribal islands, provided with only two weeks' food supply, and supplied with only those hand tools necessary to procure fish and game and survive in harsh and unremitting conditions. *See* Balzar, *supra* note 211. Tlingit elders promised that Guthrie and Roberts, while banished, would cut enough pine logs so that upon their restoration to the tribe they would be able to build Whittlesey a new duplex and sell enough lumber to pay for the $3,000 worth of uncovered medical bills. *See* Haines, *supra* note 210.

218. *See* Haines, *supra* note 210. As Washington law makes no provision for relinquishing jurisdiction in criminal cases to other tribunals, Judge Allendoerfer was restrained from actually transferring the case to the Tinglit TPM Court and technically only postponed sentencing while reserving the right to sentence Guthrie and Roberts in the event banishment failed. *See* Haines, *supra* note 210.

219. *See generally* State v. Guthrie, 894 P.2d 1340 (Wash. Ct. App. 1995).

220. Balzar, *supra* note 211. In short order Snohomish county prosecutor, William Jaquette, clearly interested in the imposition of prison sentences and frustrated that even were it so inclined the Tlingit TPM Court could not impose any sentence greater than one year (the ICRA limits the capacity of tribal courts, *see* 25 U.S.C. §§ 1301-1303 (1994)), made even more critical *ex parte* comments on the applicability of TPM to cases before state courts:

> It's racist to treat people differently based on their ethnic background. It should not matter who a person is but the crime that was committed. What happens when another person, say a Tahitian wants to serve his sentence in Tahiti? What will we say to him? We have sentencing guidelines for judges to follow to avoid things like this.

Michael Sangiacomo, *2 Youths Face Tribal Justice; May be Sentenced to Remote Islands*, PLAIN DEALER, Sept. 1, 1994, at A1. Others soon joined Magee in branding TPM a "bizarre experiment in criminal justice" that accords "special treatment" to Indians. *Id.*

the constitutional rights of the defendants[221] or as a violation of Alaskan child welfare laws. Nevertheless, in late August 1994, Judge Allendoerfer, with the eyes of the Indian and legal communities upon him, denied a number of prosecution motions and ordered the release of the convicted Tlingit duo to Tlingit representatives based on (1) the strength of the promises of several Tlingit elders to monitor, but not assist Guthrie and Roberts, (2) the desire to rehabilitate the offenders, (3) the utility of the sentence of banishment in terms of the conservation of state resources,[222] and (4) the apparent contrition of the wrongdoers.[223]

C. TLINGIT TPM A HOAX? RAISING THE QUESTION OF TRIBAL COMMITMENT

However, before Guthrie and Roberts even reached the Tlingit reservation, a firestorm of rumor, innuendo, and [dis]information erupted, revealing rifts both within the Tlingit tribe and between the Tlingits and mainstream society that threatened the success of the experiment before it had even begun. When Guthrie and Roberts were a week late in reporting to the Tlingit TPM Court, Magee, publicly suspecting they had fled to Canada,[224] filed a motion in the Washington Court of Appeals to

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221. Banishment as a punishment was used by the ancient Greeks as well as the English, who referred to their dispatch of convicts to Australia and the New World as "transportation"; many indigenous groups continue to use banishment and other centuries-old pre-Columbian forms of social ostracism as inducements to conform with group expectations. Opinion was divided as to the sentence of banishment offered as a plea bargain for Guthrie and Roberts, with some maintaining that banishment was less cruel than imprisonment, particularly for the young (some derisively referred to it as an "extended vacation"), and others certain that banishment was a violation of the constitutional prohibition against cruel and unusual punishment. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Sangiacomo, *supra* note 220. By branding banishment "cruel and unusual" simply because federal and state courts had previously deemed it so and because Guthrie and Roberts were obligated to procure their own sustenance in wilderness conditions and to provide for their own medical care, several commentators betrayed a lack of understanding of and appreciation for the Tlingit relationship to their natural environment as well as an utter incapacity to appreciate the purposive dissociation of Tlingit TPM from much of U.S. and state constitutional jurisprudence—a dissociation sanctioned to significant extent by the Constitution and federal laws such as the ITJA. *See, e.g.*, Stephanie J. Kim, 29 J. MARSHALL L. REV. 239, 258-60 (1995).

222. Banishment would allow the State of Washington to save the costs that otherwise would be incurred in incarcerating Guthrie and Roberts.

223. *See* Haines, *supra* note 210 (reporting that both Guthrie and Roberts appeared initially to be genuinely remorseful and desirous of rehabilitation and restitution). While interviewed in prison awaiting release to tribal officials, Guthrie made the following statement about his hopes for his banishment:

> I don't want to say it's better. But here, I sit and watch TV, order food from the commissary, have friends and play cards. There's nothing punishing and rehabilitating about it. Most of my time [during banishment] will be spent thinking about what's transpired . . . That's why I'm going out there. [The robbery] was never meant to be like it was. And sorry isn't a big enough word.

Haines, *supra* note 210.

224. *See* Egan, *supra* note 204. In fact, Guthrie and Roberts were en route, having taken a ferry to Alaska and then driven to Ketchican before completing the journey by ground transportation. At all times tribal officials were in custody of the two. *See* Sangiacomo, *supra* note 220.

overturn Judge Allendoerfer's order delaying sentencing.[225] Legal-historical research, aided by Tlingit opponents of the proposed banishment, revealed that in traditional Tlingit culture punishments for serious physical attacks upon others included slavery, dismemberment of digits or hands, or execution, but not banishment.[226] Suspicion then turned upon James: newspapers-of-record reported that of the eight people James had listed as tribal elders in his request for alternative sentencing all were members of his own nuclear family and six had criminal records.[227] Moreover, James was not technically a Tlingit judicial official and had not lived on Tlingit land for over thirty years.[228] Edward Thomas, one of three official Tlingit tribal court judges, was not alone in expressing his fear that James' machinations would bring ridicule upon the Tlingit and "could lead to us all being branded as makeshift, conniving and dishonorable."[229]

D. TPM TAKES THE STAGE

Nevertheless, in early September, twelve Tlingit elders served as peacemakers in a two-day TPM ceremony in which Whittlesey and his wife, Guthrie and Roberts and their extended families, and other Tlingits gathered to hear and restore all parties. After Guthrie and Roberts indicated they had been drunk when they committed the crime and expressed their great remorse and shame at length, tribal elders

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225. The Washington Court of Appeals subsequently granted a prosecution motion and overturned Judge Allendoerfer on the issue of whether banishment might result in reduced sentences for Guthrie and Roberts, holding that banishment might be a supplemental, but not a substitute, form of punishment. *See* Louis Sahagun, *Banishment Tests Not Only Criminals but Their Tribe as Well*, L.A. TIMES, June 21, 1995, at 5.

226. *See* Sangiacomo, *supra* note 220; Egan, *supra* note 204.

227. *See* Egan, *supra* note 204. Further investigative journalism conducted after the banishment began revealed that James' brother Daryle had been convicted of sexual assaults of non-Indian juveniles in Washington State in 1975 and Ketchikan, Alaska in the early 1990s, and that in the latter case James had filed an unsuccessful motion with the state court asking for sentencing by the Tlingit TPM Court. *See No To Tribal Justice*, SEATTLE TIMES, May 2, 1995, at B4.

228. *See* Egan, *supra* note 204. The revelations about James, who was suspected within the tribe of seeking to profit from tabloid money and movie rights, were particularly disturbing to the Tlingit Tribal Vice President, Aaron Iaacs, who had the following to say about the developing fiasco: "Rudy James was just making this up as he went along. The biggest problem the native people have with this now is we are going to be held responsible for the promises of Rudy James . . . We are going to be stuck with the $25,000 in restitution." Egan, *supra* note 204.

229. *Egan, supra* note 204. For most members of the federally-recognized Tlingit-Haida Central Council in Klawock, a modernist/assimilationist approach to crime generally and the case of Guthrie and Roberts dictated a solution in the courts of Washington State, and James, a traditionalist outsider of an inferior clan, had no authority, customary or otherwise, to interject himself into the administration of tribal legal affairs. Thus, the official position of the Tlingit-Haida Central Council was and has remained that the "banishment" of Guthrie and Roberts was without the official sanction of the Tlingit tribe, and the weight of any resultant failures or embarrassments ought to be borne exclusively by James. Telephone Interviews with Michelle Matt, Representative of Tlingit-Haida Central Council, and Roseanne Demmert, former President of Tlingit-Haida Central Council (July 7, 2000).

"suggested" banishment and restitution as James had promised Judge Allendoerfer they would. Whittlesey then gave his unreserved blessing to the proposal[230] as a means better suited even than American-style adjudication to provide atonement and rehabilitation.[231] Tribal elders, buoyed by a result which underscored their cultural distinctiveness and sovereignty,[232] passed sentences of banishment upon Guthrie and Roberts and urged that all Tlingits, including a newly forgiven James,[233] "move together forward as brothers and sisters" to make the first banishment in modern history a landmark in cooperation between a state and tribal court.[234]

However, despite the approval of the settlement by all those immediately concerned with the dispute, non-Indian critics lambasted the outcome on procedural and substantive grounds. One commentator referred to the process as "anything but organized or ordinary. . . . [J]udges sometimes seemed to make up the rules as they went along . . . . They made strange demands, such as telling spectators not to turn their heads to watch the judges enter."[235] Others recapitulated the notion that encouraging TPM would goad foreign nationals to demand the application of their own national legal systems or allow wealthy defendants to purchase justice by paying off restitution to avoid jail. Still others claimed that smirks on the faces of Guthrie and Roberts as tribal elders handed down the sentence presaged a lack of commitment to their own rehabilitation that would lead to the failure of banishment as a substitute for incarceration.[236]

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230. *See* Phil Reeves, *Tribal "Court" Banishes Alaskan Pizza Bandits*, INDEPENDENT (London), Sept. 4, 1994, at 10. Tlingit tribal justice officials insisted that the approval of Whittlesey, as well as any other future victim who was not a member of the Tlingit, was *sine qua non* for a case to be heard in Tlingit TPM Court; similarly, Tlingit officials indicated that the consent of Whittlesey was required for any resolution of the dispute. *See id.*

231. *See id.* Most Alaskans were far more skeptical that banishment would prove of sufficient punitive value: as an elderly white fisherman put it, "Anyone can get to these places [where Guthrie and Roberts would be banished] by boat. Their pals will be out there every night, drinking beer and smoking dope." *Id.* at 11.

232. *See* Sangiacomo, *supra* note 220. Several tribal elders expressed the hope that their conduct of the Guthrie and Roberts banishment would encourage "State and federal authorities [to] recognize the historical rights of Native Americans—already recognized by the United Nations and other bodies—to conduct their own affairs, which includes government and judicial systems." Michael Sangiacomo, *A Different Kind of Justice; Alaskan Indian Court May Open the Door to Alternatives*, PLAIN DEALER, Sept. 11, 1994 at A1.

233. *See* Michael Sangiacomo, *Life in Exile; As Judges Visit Their Remote Island, Banished Boys Aren't in Total Isolation*, PLAIN DEALER, Dec. 25, 1994, at A1. Seizing upon the spirit of reconciliation, James commented that "We want them to come out of this whole, clean Tlingit gentlemen, get married and raise a family," but "[n]othing is over until the victim feels like he is fully compensated for his loss and says so. . . . Then Judge Allendoerfer and the tribal court must be satisfied." *Id.*

234. *See Experiment in Tribal Justice; 2 Youths are Banished*, N.Y. TIMES, Sept. 3., 1994, at A6.

235. *See* Sangiacomo, *supra* note 232.

236. *See* Suzanne Fields, *No Midnight Basketball for Tlingits*, ATLANTA CONST., Sept. 12, 1994, at A10.

E. TPM UNDER THE SPOTLIGHT: BANISHMENT, A COMPROMISE COMPROMISED

On September 6, Tlingit elders, including family members, delivered Guthrie and Roberts by boat to their exile on two separate remote islands the locations, which were kept secret to prevent interference by press or other parties. After assisting them in constructing one-room shelters, the elders left them to the certainty of a brutal winter with fishing poles, a wood stove, sleeping bags, religious books, a two-week supply of food and little more than dogs to protect against wolves and bears.[237] Guthrie and Roberts expressed their fear of wild animals, the cold, the potential for injury, and Bigfoot, which the Tlingit believe inhabits the islands to which they were banished. However, both took heart in the knowledge that the banishment would purify their spirits and that the entire tribe would gather for a day of ceremony and feasting after which they would be welcomed back into the tribe and their banishment would never again be mentioned.[238] Furthermore, Guthrie expressed his confidence that upon the conclusion of his banishment Hollywood would purchase the motion picture rights to the story, enabling him to make complete restitution to Whittlesey.[239]

By December, the portents of failure had been proven accurate. Tlingit tribal officials from the Central Council discovered that Guthrie and Roberts were living not on separate islands as decreed but on the Kuiu Island, a mere few miles apart. Roberts' father and grandfather, who had been making scores of visits to deliver contraband food, radios, and rifles, ignored repeated tribal cease and desist orders.[240] By early 1995, the two were frequent visitors in towns neighboring their reservation, and on more than one occasion when Guthrie became violent the police were summoned.[241] The final straw was the August 1995 transfer of the duo from Kuiu Island to a small tribally-owned island a mere three miles and ten minutes from their homes after the U.S. Forestry Service discovered Kuiu Island was federal land.

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237. *See Higher Law in Alaska*, BOSTON GLOBE, Sept. 7, 1994, at 12. The process of establishing Guthrie and Roberts in the locations of their banishment consumed more than $60,000 of tribal resources and 10,000 man-hours of legal work and manual labor. *See* Sahagun, *supra* note 225.

238. *See* Sangiacomo, *supra* note 232.

239. *See* Sangiacomo, *supra* note 232.

240. *See* Sangiacomo, *supra* note 232. The Roberts family routinely permitted Roberts to spend the night in their home on the reservation.

241. On one occasion Guthrie flew into a rage upon failing a driver's license test; on another he threatened a dentist during the receipt of dental care. *See Exile for 2 Youths is Far Less Lonely Than Judge Sought*, CHI. TRIB., Aug. 6, 1995, at C18.

F. I TOLD YOU SO! TPM GIVEN HARSH REVIEWS

With the banishment now "starting to look more like an extended camping trip"[242] than a sentence for serious felonies, James was ordered into court on September 19 by Judge Allendoerfer for a status conference. James was forced to concede that the Tlingits had failed to live up to their responsibilities,[243] and that Guthrie and Roberts should be sentenced to prison.[244]

Judge Allendoerfer promptly ordered Guthrie and Roberts to appear before him on October 3, for a sentencing hearing during which, while conceding some improvement in the character of the two wrongdoers, he subtly castigated the failure of the Tlingits to uphold their agreement.[245] Judge Allendoerfer elected to end the experiment while it could still be deemed a partial success[246] and sentenced Guthrie and Roberts to prison terms of fifty-five and thirty-one months respectively, with credit of nearly two years for time served while awaiting trial and while banished. Judge Allendoerfer also held them jointly liable for $35,000 in restitution to Whittlesey.[247] Despite the conciliatory nature of

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242. *Justice Banished?*, PLAIN DEALER, Aug. 13, 1995, at C2.

243. *Banished Teenagers to Report to Court*, PLAIN DEALER, Sept. 20, 1995, at A10. Although a 13-member panel of Tlingit tribal court judges was split six-to-six with one abstaining on the question of whether the banishment had been successful, James readily admitted that the pair of wrongdoers had failed as yet to pay for their "horrible crime." *Experiment in Tribal Justice Failing for Alaska Teens*, CHARLESTON GAZETTE, Sept. 10, 1995, at A6. However, Judge Allendoerfer staunchly maintained his insistence that the failure of the banishment was not the fault of either Guthrie or Roberts but rather the result of familial interference and tribal inability or unwillingness to sanction it. *See id.*

244. *See* Michael Sangiacomo, *Judge Admits Teens' Banishment a Failure*, PLAIN DEALER, Aug. 30, 1995, at 4A. Despite his absolution of Guthrie and Roberts, Judge Allendoerfer nevertheless believed that prison was in the interests of the offenders as well as of the Tlingit Nation. *Id.*

245. Although Judge Allendoerfer indicated that the "conflicted performance by the [Tlingit TPM Court] ha[d] been unfortunate but understandable" given the lack of precedent and divisions within Tlingit society, his displeasure with the Tlingit judicial system for failing to properly oversee the banishment is plain from the tenor of his sentencing order. *See* Report of Proceedings at 4-5, 6, State v. Guthrie (Nos. 93-1-01369-2, 93-1-01406-1) (Wash. Super. Ct. Oct. 3. 1995) (on file with Washington Superior Court, County of Snohomish).

246. Judge Allendoerfer's sentencing order read as follows: "I find that this experiment has some flaws that unfortunately threaten its credibility and integrity. I have determined, therefore, that it is time, while it can still be ended on a positive note." *Judge Ends Experiment with Tribal Justice*, CHI. TRIB., Oct. 4, 1995, at N6 [hereinafter *Experiment*]. The sentence should not be construed as an outright rejection of TPM and/or of the traditional sentence of banishment, however. The wording of Judge Allendoerfer's sentencing order suggests that TPM and traditional restorative measures such as banishment might be devices to be used in addition to, if not as complete substitutes for, traditional prison sentences in cases of violent crimes committed by Indians, particularly when ethnic identity is implicated in the criminal behavior. Specifically, Judge Allendoerfer found that the banishment had "raised society's expectations of the criminal justice system" by reintroducing long-dormant notions of remorse and shame and by reawakening concepts of restitution, rehabilitation, discipline, and ethnic pride. *See* Report of Proceedings at 2-3, 8, State v. Guthrie (Nos. 93-1-01369-2, 93-1-01406-1) (Wash. Super. Ct. Oct. 3. 1995) (on file with Washington Superior Court, County of Snohomish).

247. *See Experiment*, *supra* note 246. Guthrie and Roberts were released from prison under the probationary supervision of Judge Allendoerfer, who monitored both for the purpose of collection of restitution and court costs. However, upon his release from prison in 1996, Guthrie was imprisoned in

the rhetoric emerging from the Snohomish Superior Court and despite recent federal support for TPM as manifested in the ITJA, a collective "I told you so!" resounded through the halls of mainstream legal and political institutions. TPM and the American adjudicative system were once again "jostl[ing] with one another in a market-place of possibilities"[248] characterized less by mutual understanding of and respect for cultural differences than by majoritarian reactionism.

Although the case of Guthrie and Roberts was not the primary focus, the politics of state recognition of the sovereign collective rights of indigenous peoples to employ traditional tribal dispute resolution became a facet of the evolving contest over the "third-generation" of human rights.[249] The Tlingit attempt to create and apply law in their own legal institutions made for strange domestic bedfellows. Scholars from the subdiscipline of law-and-economics entered the fray in the midst of an ethnocentric and feminist backlash[250] against TPM, suggesting that the tribal sanctioning mechanisms were so fundamentally weakened that incentives to opportunism and defection, such as had occurred among the Tlingit could not be contained by threats of ostracism, but

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Alaska for yet another assault following which he was soon convicted and sentenced to prison for a federal crime involving an explosive device. *See* Letter from Hon. Judge James Allendoerfer, Superior Court of the State of Washington for Snohomish County, to the author (June 27, 2000) (on file with author). As an indication of the failure of banishment as to his case, Guthrie continues to blame his problems on his notoriety and the resulting inability to secure gainful employment. *See* Rebekah Denn, *Crime, Redemption, After Time on an Isolated Alaskan Island, Followed by Prison, a Troubled Young Man is Getting Another Chance*, SEATTLE TIMES, Jan. 7, 1998, at A1. In contrast, Roberts has recently been released from prison where he earned a GED and excelled in public speaking classes. *See id.* Roberts claims to have matured while undergoing the painful isolation of banishment, and he speaks now of following the "red road" of spiritual purity (traditional Tlingit religion) to college in anticipation of a career as a stockbroker. Whittlesey is now divorced as a consequence of the strain his injuries placed upon his marriage, but he prays that Guthrie and Roberts will make better lives for themselves. *See id.*; *see also* Yeager, *supra* note 206.

248. Demleitner, *supra* note 19, at 653.

249. The so-called "first generation" of human rights are civil and political rights enshrined as universal moral imperatives in the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant of Civil and Political Rights, which obligate state noninterference in what have generally been considered individual rights. *See supra* notes 26-27 and accompanying text. "Second generation" human rights are essentially individual entitlements to economic, social, and cultural benefits that, while less widely recognized since they arguably require states to take affirmative action, enjoy the support of much of the international community as evidenced by the many parties to the International Covenant of Economic, Social, and Cultural Rights. "Third generation" human rights, as expressed in the Draft Declaration, are a recent construction designed to endow indigenous groups *qua* groups with legal personality and standing to bring complaints against states for violation of the collective rights of indigenous peoples. Although authoritarian regimes have been hostile critics of third generation human rights, the greatest functional resistance to extending practical safeguards and structural protection to indigenous peoples has been mounted by liberal individualist states, led by the U.S., that claim existing domestic protective measures, whether positive legislation or constitutionally-based judicial review, are adequate to guarantee the rights of individuals to participate, or not participate, in cultural groupings. For a discussion of the significance of third generation rights to the project of reclaiming Indian sovereignty, see generally David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 423-24 (1994).

250. *See supra* Part III.C.5(c).

instead by mandated judicial intervention by state and federal governments.[251] Insightful non-Indian analysis suggested solutions to this and other "issues of difference" could be discovered through extensive and respectful dialogue,[252] in the course of which indigenous legal systems would be afforded more enriched opportunities to establish their rationality, utility, and proper sphere of operations.[253] Non-Indians jealously guarding political and legal power in the United States were unwilling to accept the recent Tlingit experience as the model for culturally distinct indigenous legal communities operating within their midst.[254]

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251. *See* Posner, *supra* note 32, at 155-57. Although he concedes that state imposition of criminal laws and legal institutions weakens tribal legal systems since tribal members "can [then] depend on the law to deter them and their children from engaging in deviant behavior," and although "criminal laws are crude instruments compared to the social pressures that a solitary church can exert," when tribal members engage in deviant antisocial behavior which threatens the interests of the state and tribal sanctions fail to modify behaviors or rectify the damage due to the weakening of tribal values, Posner advocates state intervention to displace traditional tribal legal systems and prevent a "schism" in the American legal system. *See* Posner, *supra* note 32, at 183-86.

252. *See* Kennedy, *supra* note 35, at 604.

253. Several scholars suggest that reconceiving the tribal-state-federal tripartite federalist system as a framework not for subordination or paternalism but for negotiation between sovereigns would provide a less exploitative and more productive alternative to the current relationship between indigenous and non-indigenous peoples in the U.S. *See, e.g.*, Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1990-92 (1996) (arguing for a general development of ADR in the field of U.S.-Indian relations); *see also* Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 970-72, 979-80 (1996) (arguing that the historical treaty process should serve as the guideline for a new framework of government-to-government negotiation). Precisely because cultural views and internal rectitude systems will always remain divergent as between peoples shaped by very different historical experiences, one commentator, offering the Indian Gaming Regulatory Act as a model, suggested that negotiated sovereign-to-sovereign compacts between Indian tribes and states could resolve questions of subject matter, jurisdiction, and conflicts of laws and thereby facilitate the relationship of indigenous and state legal systems without requiring resort to a unified theory of indigenous rights or international conventions. *See* Rosenn, *supra* note 22, at 255 n.150 (referencing as a model the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721 (1994)).

254. *See* Rosenn, *supra* note 22, at 258.

Thus, the prospects for a serious intellectual exchange appeared bleak.[255]

V. CONCLUSION

Indian legal scholars and advocates[256] have attempted to extract and propound important lessons from the case of the Tlingit pizza bandits. Although Indian legal scholars already understand the futility of attempting to transport legal regimes, and in particular TPM, across cultural boundaries,[257] several suggest the failure of TPM, in cases like that of Guthrie and Roberts,[258] is caused by the absence of a tribal TPM

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255. *See* Mary E. Clark, *Symptom of Cultural Pathologies: A Hypothesis*, *in* CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 43, 52 (Dennis J.D. Sandole & Hugo Vander Merwe eds., 1993). Although the non-Indian majority in the United States is neither unusual nor deserving of special reprobation for their suppression of dialogue and discussion with their indigenous peoples; the skewing of the calculus of power in favor of majorities is a global phenomenon, and

> [a] powerful hurdle facing cultural self-examination will be the resistance from those who gain most from the status quo. These often include persons who control the economic and political power in a society, and those who otherwise benefit from the institutions that are causing social pathologies. People upholding particular . . . ideals . . . are . . . the guardians of a shared sacred meaning. Because such groups often control the means of both coercion and persuasion . . . they can effectively block the sort of public dialogue that is needed for successful cultural change.

Id. Still, the unwillingness of many Americans to listen seriously to the third-generation international human rights claims made by Indian tribes, coupled with the routine consignment to and dismissal of such claims in domestic political and legal fora where hostile precedent blinds even those who are prone to providing a sympathetic audience, has sparked concerted discussion of the creation of a permanent international indigenous legal forum under United Nations auspices. Such an institution would encourage states to negotiate with their indigenous peoples as equals and to conform their conduct to the evolving dictates of third-generation human rights and international customary law standards. *See* Rosenn, *supra* note 22, at 248; *see also* Frickey, *supra* note 25, at 1777.

256. Although meaningful choice with regard to the development of a legal system is a central constituent of indigenous sovereignty and to the reauthorization of a national self, it is by no means the only constituent. However, to many Indian scholars, the threat congressional power poses to tribal sovereignty cannot be overstated. Given the plenary power of Congress to terminate the federal-tribal trust relationship, dissolve tribal governments at will, and force Indian individuals into political association with the state and federal governments, Indians are loathe to surrender any aspect of their distinctive cultural identity as to do so might thereby establish an important element of the predicate for such broadly assimilative congressional actions: that Indian tribes are no longer distinct political entities in need of and entitled to Congressional protection and tutelage. *See supra* note 193 (referring to special fiduciary obligation of U.S. to Indian tribes). As one Indian scholar rhetorically frames the issue, "[i]f assimilation continues, and . . . Indians continue to adopt American cultural values transmitted to them by their Americanized tribal judicial systems, what will be the reaction of the federal government when a tribal society is indistinct from American society as a whole?" *See* Porter, *supra* note 21, at 283.

257. Absent an environment of shared ties of kinship and sacred worldview, TPM will prove dysfunctional in its application. *See* Ness & Nolan, *supra* note 146.

258. It is important to reiterate that each tribe is a distinct entity with distinct traditions and needs relative to its own legal system, and what is an appropriate form of dispute resolution for one tribe may be wholly inappropriate to another. Economic, political, and legal interests diverge as between tribes in much the same way as between recognized states, and for TPM to succeed "tribes must bring to the foreground traditional forms of dispute resolution that will serve as the vehicles through which these values can be expressed, legitimized, and enforced for their own people, [and] these will [vary] from tribe to tribe." Haberfeld & Townsend, *supra* note 53, at 419.

absence of a tribal TPM tradition is attributable to the displacement of traditional spiritual values[259] by assimilative forces which reward individual autonomy at the expense of tribal authority and to a lack of personal involvement in and commitment to the process on the part of wrongdoers, their families, and/or tribal authorities. To Porter:

> The key to understanding traditional native justice systems lies in the closed nature of tribal communities and the obligations of individual tribal members to perpetuate established norms. Only then can ridicule, ostracism, [and] banishment . . . all processes utilized by indigenous people to ensure that individual misconduct was corrected and the community norms respected and perpetuated—make sense. . . .
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> . . .
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> Comfort with the system, or more precisely, total understanding and acceptance of the system was an integral component to why peacemaking worked to resolve internal disputes.[260]

Furthermore:

> [T]he most important factor in a functional [TPM] system is the extent to which there is willing participation in the system. With tribal members, the degree of participation depends upon the value that tribal members place on tribal membership and how they are perceived by others around them . . . [U]nless there is some person in the community who, by force of relationship, respect or even will, can influence the conduct of a party in dispute, it is impossible for peace to be achieved willingly.
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> The devaluation or nonvaluation of relationship is a reality that any effort to revitalize peacemaking must accommodate. As indigenous people have evolved and been shaped by the dominant society, there has been considerable change in the dynamic that exists between a tribe, its members, and non-

259. *See* Reisman, *supra* note 15, at 27 (noting that in the process of colonization of the Americas, European colonizers eradicated the "inner worlds of indigenous peoples" and destroyed "[e]ntire visions of past and future," to include the traditional spiritual values which produced and nurtured traditional forms of dispute resolution). Although indigenous peoples have done their best to maintain a vigorous cultural self-defense against assimilative external forces, the past century has been particularly devastating to the integrity of traditional tribal cultures, and the destruction of traditional spirituality, which bound individuals to a disciplinary code of personal and collective conduct and responsibility is a "loss of inestimable value" experienced most acutely in moments of tribal division such as that occasioned by the debacle of Guthrie and Roberts. *See* Reisman, *supra* note 15, at 27.

260. Porter, *supra* note 21, at 255.

> members. In many tribes, the community may be noticeably similar to non-Indian communities . . .
>
> [A]s individuals have become less dependent on the tribe for their personal economic viability, they perceive that they are less dependent upon the tribe for their political, social, or spiritual viability as well. To the extent that an individual can now physically leave the tribe and still, at least nominally, provide for basic human needs, individuals have become less subject to tribal norms.[261]

In other words, the overarching objective of reclaiming tribal sovereignty, carried in no small measure upon the back of tribal projects reintroducing and refining TPM, should not suffer as the result of the case of Guthrie and Roberts. In fact, the inability of Tlingit culture to successfully support and nurture the experimental banishment of the wrongdoers is at least as much an indictment of the culturally and spiritually destructive process of U.S. colonialism as it is a referendum on the suitability of TPM as a general substitute for the foreign legal systems imposed upon conquered Indian tribes. Moreover, the case of Guthrie and Roberts unfairly presented a fledgling TPM system with a legal load greater than it could legitimately have been expected to bear. Had Whittlesey been another Tlingit and thus a member of the lawmaking community, or had the crime occurred on the reservation and thus been the subject of original jurisdiction for the Tlingit tribal court, fewer exogenous social variables, such as close State and media supervision, would have been permitted to influence perceptions of the result.[262] Consequently, substitution of imposed adversarial legal systems with TPM ought to proceed with caution, with special attention given to the form and substance of the legal system adopted by each tribe appropriate not only to its culture but also to its disputes.[263] Hybrid or ad hoc implementation of modified forms of TPM might be in order, and above all, the royal road to successful substitution of dispute resolutions systems will be long and replete with obstacles.[264]

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261. Porter, *supra* note 21, at 300.

262. To wit, Judge Allendoerfer insists that it was the precise conjunction of attempts to merge TPM with American jurisprudence with "cross-cultural misunderstandings inflamed by the media" that overwhelmed the capacity of TPM in the case of Guthrie and Roberts, and his general opinion of tribal dispute resolution mechanisms remains "respectful and optimistic." *See* Letter from Hon. Judge James H. Allendoerfer, Superior Court of the State of Washington for Snohomish County, to the author (June 27, 2000) (on file with author). Moreover, despite and perhaps because of his experience with the case of Guthrie and Roberts, Judge Allendoerfer, in the event that another case involving "youthful offenders, who happen to also be struggling with ethnic identity issues" would present itself before him, would "accept [the] challenge" of TPM again. *Id.*

263. *See* Porter, *supra* note 21, at 304-05.

264. Although cultural, philosophical, and sociological hurdles stand between TPM and its

At the same time, Indian scholars and activists insist that the reclamation of tribal sovereignty, if it is to be found down the path of legal autonomy, will require the non-Indian majority to first "acknowledge[ ] the history of indigenous discrimination, discard[ ] the goal of assimilation, and construct[ ] a [new] regime giving dignity and control to indigenous people."[265] While Indian tribes still seek a measured separatism that permits self-determination rather than secession, invigoration of TPM within the Anglo-American legal tradition presents not simply a legal problem but a philosophical, even an existential, conflict between peoples.[266] As history suggests, differences between the dominant and indigenous jurisprudential views are susceptible of resolution only by force on the one hand or by mutual respect, recognition, understanding,[267] and negotiation on the other.[268]

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application to disputes between Indians and non-Indians or Indians of other tribes, the Canadian experience with TPM demonstrates that these hurdles are not insurmountable where there is mutual willingness to clear them. TPM in Canada has been applied, not altogether unsuccessfully, to the resolution of disputes between Indians and non-Indians, between Indians of different tribes, and between non-Indians. *See* Green, *supra* note 172, at 116-17. While the success of TPM is invariably a function of the capacity of relevant communities to exert the sort of social control necessary to make alternative sentences enforceable and meaningful, the domain of persons and disputes in which TPM can profitably operate need not be defined exclusively by reference to ethnicity, race, or religion: as Judge Grotsky commented on the suitability of TPM to the resolution of disputes in Canada:

> [T]he nature of an offender's community, and its willingness to participate in the sentencing process, are factors which, in my respectful view, will in each particular case, depending always on the offender's suitability as a candidate therefore, be relevant to the determination of whether a sentencing circle ought to be established.

R. v. Cheekinew (1993), 80 C.C.C. (3d) 143, 147 (Sask. Q.B.)

To this might be appended the requirement that the victim, and his community, commit to participating in the process such that sentences reached have the imprimatur of the party most closely affected by the offense. TPM as an alternative method of dispute resolution depends ultimately upon the active, close, and ongoing involvement of multiple communities—those of offenders and victims—particularly in plural democracies.

265. Gupta, *supra* note 17, at 1785.

266. *See* Porter, *supra* note 21, at 276-77 (stressing that "tribal dispute resolution mechanism[s] . . . ha[ve] everything to do with how tribal members interact with one another, how capable they are of working with [each other] on common endeavors, and thus, how strong their families, clans, communities, and nations will be."); *see also* Reisman, *supra* note 15, at 35 (building upon the centrality of law to the expression of humanity and community by noting that "it is the integrity of the inner worlds of peoples—their rectitude systems or their sense of spirituality—that is their distinctive humanity.") If indeed these scholars, one indigenous, the other of immigrant origin, are correct, the humanity of Indians and non-Indians alike depends upon whether or not both peoples are able to develop peaceful means to resolve conflicts that arise over the independent management of coexistent legal systems.

267. *See* Porter, *supra* note 21, at 303 (opining that "[i]t is extremely easy for an Anglo-American trained lawyer to believe that he or she knows how to deal with any particular legal problem."); *see also* Zuni Cruz, *supra* note 18, at 589 (arguing that a simple *legal* understanding, from either the Anglo-American *or* the traditional Indian perspective, is inadequate, for only "understanding the legal issue from a historical, cultural, social and political perspective as well as from a legal perspective can mean the difference between resolution of the issue or disruption of the community and lack of resolution of the issue").

268. *See* Frickey, *supra* note 25, at 1780-81 (suggesting that, for proponents of TPM, negotiation is the sole viable alternative to contestation with the adversarial paradigm and its adherents). Negotiation of protocols between individual tribes and state and federal governments to ensure ongoing support for and participation in TPM is perhaps the soundest approach to peaceful judicial coexistence. Such negotiations can establish conditions, substantive guidelines, and procedures to govern the referral and resolution of cases in TPM; over time the increased continuity and transparency of the process

Just as even the most ardent advocates of TPM would not impose traditional Indian methods of dispute resolution upon those who adhere to the process and substance of other legal systems, federal and state governments, which have already stripped away so much of tribal legal autonomy while retaining the power to take what remains, should not serve as "cultural game warden[s]"[269] charged with the power to dictate to Indian tribes if, how, and when they are entitled to resort to culturally appropriate methods of dispute resolution. There is room, even in an era in which the customary international law of indigenous collective rights does not yet impose obligations on states to respect the right of tribes to make and apply their own law, for peaceful, negotiated solutions to disputes that arise. Legal prescriptions and proscriptions drawn from Anglo-American jurisprudence and caselaw precedents, limited by their immersion in bloody history, interposed to prevent the function of TPM, will rarely blaze a trail toward a negotiated cohabitation.

Moreover, differences in legal systems are some of the clearest expressions of the very essence of cultural difference; as Laurence understands:

> [M]ost people on either side of a boundary prefer their way of doing things over the way things are done on the other side. People are funny that way. One should not expect people on one side of the line to see immediately the superior wisdom of the other side's ways, or to be tremendously open-minded about the difference, or to be entirely tolerant of departures from what is the norm on their side. To expect that is to expect too much: either the Indians have to surrender their old ways to the younger, headstrong, diverse, European- and African- and Asian-influenced dominant society, or the non-Indians have to all become New Agers, honoring the Earth Mother, replicating the Sun Dance, and resolving their disputes alternatively. Don't count on it. To use Sam Deloria's famous offering, one should not expect to hear from one side of the line the

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may be successful in capturing the interest and approval of non-Indian critics, in reducing Indian "feelings of estrangement and separation from the Anglo-[American] justice system," and, even more importantly, in reducing the rates of Indian offending and incarceration. Green, *supra* note 172, at 124. Moreover, negotiations between state and federal governments and Indian tribes conducted as between mutual sovereigns will aid in furthering the development of mutual respect, tolerance, and peaceful coexistence.

By the same token, negotiation between modernists and traditionalists will be necessary if negotiations between Indian tribes and non-Indian governments are to be productive, for even if it is unrealistic to expect that all Indian people will come to re-embrace TPM as the appropriate alternative to the Anglo-American legal system it is essential, as the case of Guthrie and Roberts makes clear, that divisions within Indian tribes not project themselves across borders to compromise the effectiveness of tribal efforts to reclaim legal autonomy from those who have suppressed it for centuries.

269. Rosenn, *supra* note 22, at 252-53.

sound of ten thousand hands slapping ten thousand foreheads: "Damn. Why didn't we think of that?"[270]

Despite the tortured history of U.S.-Indian relations, the entrenched interests supporting and benefiting from the imposition of Anglo-European law upon Indian tribes, and the highly publicized disappointment of the Tlingit attempt to implement TPM, if the dominant society will undertake to shed assumptions of Indian inferiority, recognize indigenous jurisprudence as worthy of respect, and accord Indian tribes the status of coequal negotiating partners, a dialectic may develop and lead to greater legal diversity, greater mutual cultural respect, and above all a more peaceful coexistence. Moreover, this new harmonious paradigm of U.S.-Indian relations may serve as a model for other indigenous groups and other states across the globe against which to pattern their future relationships in a more morally, legally, and socially attractive fashion. Such is the hope for our shared and interdependent future.

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270. Laurence, *supra* note 113, at 118-19.